Supreme Court, U.S.
FILED

No. 061215 MAR - 5 2007

OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 2006

Clover Park School District No. 400 of Pierce County, Washington,
Petitioner,

v.

Steilacoom School District No. 1 of Pierce County, Washington; Puget Sound Educational Service District Regional Committee on School District Organization; and Washington State Board of Education,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

PETITION FOR WRIT OF CERTIORARI

Michael W. Hoge
Counsel of Record
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 359-8000
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether respondent Steilacoom School District's race-based peremptory removal of the original trial court judge violated the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause of the Fourteenth Amendment requires that petitioner Clover Park School District be permitted normal civil discovery regarding certain of its claims and respondents' asserted defenses.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

TABLE OF APPENDICES vi

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Proceedings Before Respondent Regional Committee 3

B. Clover Park Appeals to Respondent State Board of Education and Trial Court 4

C. Respondent Steilacoom's Peremptory Motion and Affidavit of Prejudice Against African-American Trial Court Judge 4

D. Trial Court Proceedings Regarding Discovery and Summary Judgment 5

E. Clover Park's Appeal and Petition for Review 6

REASONS FOR GRANTING THE PETITION 7

I. The Equal Protection Clause Prohibits Race-Based Peremptory Removal of Trial Court Judges 7

A. The Courts of the State of Washington Declined to Consider Whether the Fourteenth Amendment Prevents Race-Based Peremptory Removal of Trial Court Judges 7

B. The Sequence of Events Is Powerfully Suggestive of a Racial Motive for Steilacoom's Motion of Prejudice 9

C. Steilacoom Did Not Dispel, But Rather Amplified, the Appearance of a Racial Motivation 10

D. The Record Supports Reversal of the Judgment Below 11

II. The Trial Court's Orders Quashing Clover Park's Discovery, And The Trial Court's Grant Of Summary Judgment Before Considering Clover Park's Intermediate Application For Discovery, Denied Clover Park Due Process 11

A. Clover Park Has Consistently Asserted Its Right to Pursue Open Meetings Violations, and Pursue Defenses to Allegedly Unconstitutional Actions, Using Normal Civil Discovery Outside the Administrative Process 11

B. Clover Park Seeks to Vindicate Substantial State-Conferred Interests 12

C. Without Normal Civil Discovery, Clover Park Is Deprived of Any Meaningful Opportunity to Advance Its Claims or Probe Steilacoom's Constitutional Defenses 13

CONCLUSION 15

TABLE OF AUTHORITIES

Federal Cases

Batson v. Kentucky, 476 U.S. 79 (1986)..... 7, 8
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)..... 13
Carey v. Piphus, 435 U.S. 247 (1976)..... 13
Columbus Board of Education v. Penick, 443 U.S. 449 (1979)..... 7
Goss v. Lopez, 419 U.S. 565 (1975)..... 13
Hamdi v. Rumsfeld, 542 U.S. 507 (2004)..... 13
Johnson v. California, 545 U.S. 162 (2005)... 8, 10
Mathews v. Eldridge, 424 U.S. 319 (1976)..... 13, 14
Miller-El v. Dretke, 545 U.S. 231 (2005)..... 7, 10
Morrissey v. Brewer, 408 U.S. 471, 481 (1972) 13
Nelson v. Adams USA, Inc., 529 U.S. 460 (2000)..... 14
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)..... 7, 8
Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)..... 12

State Cases

People v. Superior Court, 10 Cal.Rptr.2d 873, 8 Cal.App.4th 688 (1992)..... 8
Seattle School District No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978)..... 12, 13

Constitutional Provisions

U.S. Const., amend. XIV, § 1..... 1

Statutes

Ch. 42.30 RCW..... 4, 11
RCW 28A.315.195..... 2
RCW 28A.315.195(5)..... 2
RCW 34.05.566(6)..... 1
RCW 42.30.060(1)..... 12

TABLE OF APPENDICES

	Page
Appendix A – Order of The Supreme Court of Washington Entered December 5, 2006	1a
Appendix B – Opinion of the Washington State Court of Appeals, Division II, Filed February 22, 2006	2a
Appendix C – Order Granting Steilacoom's Motion for Summary Judgment Entered February 4, 2005	21a
Appendix D – Order Granting Steilacoom's Motion to Quash Petitioner's Interrogatories and Requests for Production Entered February 2, 2005	30a
Appendix E – Order Limiting Discovery and Quashing Petitioner's Interrogatories and Requests for Production Entered February 2, 2005	32a
Appendix F – Clover Park's Opposition to Motions to Quash Discovery Filed January 20, 2005	35a
Appendix G – Hoge Declaration in Support of Clover Park's Opposition to Motions to Quash Discovery Filed January 20, 2005	43a
Appendix H - Order Consolidating Cases and Denying Motion to Vacate Order Granting Steilacoom's Motion of Prejudice Entered August 27, 2004	47a
Appendix I – Verbatim Report of August 27, 2004 Proceeding	50a

-vi-

Page

Appendix J – Clover Park's Reply Regarding Steilacoom's Motion of Prejudice Filed August 25, 2004 ..... 72a

Appendix K – Hoge Declaration in Support of Clover Park's Reply Memo Regarding Steilacoom's Motion of Prejudice Filed August 25, 2004..... 79a

Appendix L – Steilacoom's Opposition to Clover Park's Motion to Vacate Order Granting Steilacoom's Motion of Prejudice Filed August 23, 2004 ..... 82a

Appendix M – Hirst Declaration in Support of Steilacoom's Motion of Prejudice Filed August 23, 2004..... 93a

Appendix N – Himmler Declaration in Support of Steilacoom's Motion of Prejudice Filed August 23, 2004 ..... 95a

Appendix O – Clover Park's Motion to Vacate Order Granting Steilacoom's Motion of Prejudice Filed August 12, 2004 ..... 97a

Appendix P – Hoge Declaration in Support of Clover Park's Motions to Consolidate and to Vacate Order Granting Steilacoom's Motion of Prejudice Filed August 12, 2004 ..... 100a

Appendix Q – Clover Park's Opposition to Steilacoom's Motion of Prejudice Filed August 6, 2004..... 103a

Page

Appendix R – Hoge Declaration in Support of Clover Park's Opposition to Steilacoom's Motion of Prejudice Filed August 6, 2004 ... 107a

Appendix S – Order Granting Steilacoom's Motion of Prejudice Entered August 3, 2004.. 109a

Appendix T – Steilacoom's Motion of Prejudice Filed August 3, 2004 ..... 111a

Appendix U – Affidavit of Prejudice Filed August 3, 2004..... 113a

Appendix V – Clover Park's Amended Appeal from State Board of Education's and Regional Committee's Decisions Filed July 20, 2004.. 115a

Appendix W – Decision of State Board of Education Dated June 28, 2004 ..... 124a

Appendix X – Order Setting Case Schedule Filed April 21, 2004..... 127a

Appendix Y – Findings and Decisions of Regional Committee to Transfer Territory Dated March 25, 2004 ..... 129a

Appendix Z – Transcript of Regional Committee's March3,2004 Public Hearing... 139a

Appendix AA – Transcript of Regional Committee's November 25, 2003 Proceeding.. 193a

Appendix BB – RCW 4.12.040 & .050..... 231a

Appendix CC – RCW 34.05.566..... 233a

Page

Appendix DD - Clover Park's Brief to Washington State Court of Appeals Filed June 17, 2005 ..... 235a

Appendix EE - Clover Park's Reply Brief to Washington State Court of Appeals Filed August 17, 2005..... 251a

Appendix FF - Clover Park's Petition for Review to Washington Supreme Court Filed March 24, 2006..... 267a

Appendix GG -- Clover Park's Motion for Discovery Filed February 3, 2004 ..... 288a

No. _____

In the

Supreme Court of the United States

October Term, 2006

Clover Park School District No. 400 of Pierce County, Washington,

Petitioner,

v.

Steilacoom School District No. 1 of Pierce County, Washington; Puget Sound Educational Service District Regional Committee on School District Organization; and Washington State Board of Education,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

PETITION FOR WRIT OF CERTIORARI

Clover Park School District No. 400 of Pierce County, Washington ("Clover Park") respectfully petitions this Court to issue a writ of certiorari to review the judgment and decision of the Washington State Court of Appeals, Division II, issued on February 22, 2006.

OPINION BELOW

The opinion below of the Washington State Court of Appeals, Division II, is unpublished, *Clover Park School District No. 400 v. The Washington State Board of Education*, 131 Wn. App. 1046 (2006), but may be found at 2006 WL 401690. The content of the slip opinion is included as App. B hereto, p. 2a *infra*.

JURISDICTION

The opinion of the court of appeals was filed on February 22, 2006. Petitioner Clover Park's Petition for Review to the Washington Supreme Court was denied by order of December 5, 2006. App. A, p. 1a *infra*; *Clover Park School District No. 400 v. The Washington State Board of Education, et al.*, 158 Wash. 2d 1016 (2006). This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In reaching its decision below, the court of appeals relied in part on two Washington State statutes, RCW 4.12.040 and 4.12.050, regarding motions and affidavits of prejudice against trial court judges. They are set forth as App. BB, pp. 231-32a *infra*, hereto.

Further, the court of appeals relied on RCW 34.05.566(6), set forth as Appendix CC, p. 233a *infra*, in determining that petitioner Clover Park was not entitled to normal civil discovery regarding certain of its claims and respondents' defenses.

Both questions presented by petitioner Clover Park derive from Section 1 of the Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall

> abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

A. Proceedings Before Respondent Regional Committee

In March 2003, Respondent Steilacoom School District No. 1 of Pierce County, Washington ("Steilacoom") initiated a petition under RCW 28A.315.195 to the Puget Sound Educational Service District Regional Committee on School District Organization ("Regional Committee") to have a large, tax-rich portion of Clover Park's territory transferred to Steilacoom. AR 207-12.[1]

Following the period set by statute, RCW 28A.315.195(5), for negotiations between the two school districts, AR 215-16, 242, 306, 376, 402, 677-715, and following submission of information by the districts to the Regional Committee in its prescribed format, AR 329-46, 356-66, 369-75, the Regional Committee held its hearing on three dates, the first November 5, 2003, AR 748-912, the

---

[1] Citations to the Record herein are as follows: References to the Administrative Record filed by the State Board in the trial court, which contains record materials from both the Regional Committee and State Board proceedings and is part of the record on appeal, are cited as "AR ." References to the Clerk's Papers in the trial court record are cited as "CP ." References to any of the three verbatim reports of proceedings of the three trial court hearings below are cited by hearing date and transcript page(s), *e.g.*, "8/27/03 RP ." Any such materials that are also appendices to this Petition are also cited as, *e.g.*, "App. __, p. __ a *infra*."

second November 25, 2003, AR 914-56; App. AA, pp. 193-230a *infra*, and (after a subcommittee meeting held January 23, 2004, AR 957-60) the third March 3, 2004, AR 961-1022; App. Z, pp. 139-92a *infra*.

The Regional Committee issued a written decision dated March 25, 2004 approving the transfer of territory described in Steilacoom's March 2003 petition, effective September 1, 2008, and transferring taxing authority with respect to the subject territory effective with calendar year 2010, AR 317-24; App. Y, pp. 129-38a *infra*.

B. Clover Park Appeals to Respondent State Board of Education and Trial Court

In April 2004, Clover Park appealed the Regional Committee's decision on transfer of taxing authority to the Superior Court, CP 15-18, AR 197-204, and appealed the Regional Committee's decision on transfer of territory to the Washington State Board of Education ("State Board"), AR 196, 205. The State Board received most of the record of the earlier proceedings before the Regional Committee, AR 197-204, 206-1051, as well as briefing by Clover Park and Steilacoom, AR 91-123, 128-94. The State Board heard the matter at its meeting of June 18, 2004, AR 3-88, and on June 28, 2004 issued a written decision denying the appeal as to certain issues and declining to address other issues, AR 1-2; App. W, pp. 124-26a *infra*.

In late July 2004, Clover Park appealed the State Board's and Regional Committee's decisions to the Pierce County Superior Court, CP 1-10, 19-37; App. V, pp. 115-23a *infra*, and moved to consolidate the pending actions, CP 38-45.

C. Respondent Steilacoom's Peremptory Motion and Affidavit of Prejudice Against African-American Trial Court Judge

On August 3, 2004, Steilacoom filed a motion of prejudice, CP 50-51; App. T, p. 111a *infra*, against the assigned judge, the Honorable Beverly Grant, supported by an affidavit of its counsel, CP 48-49; App. U, pp. 113-14a

infra. The motion was noted for hearing on August 13, 2004, CP 46-47.

On August 6, 2004, Clover Park filed its opposition to the motion of prejudice, CP 52-59; Apps. Q & R, pp. 103-08a *infra*.

Steilacoom's motion of prejudice was granted without hearing on August 3, 2004, CP 62, 856-57; App. S, pp. 109-10a *infra* (the parties received copies on or about August 9, CP 62).

Clover Park moved on August 12, 2004 to vacate the order granting the motion of prejudice, CP 60-61, 63-73; Apps. O & P, pp. 97-102a *infra*. Steilacoom opposed Clover Park's motion to vacate, CP 74-118; Apps. L, M & N, pp. 82-96a *infra*, and Clover Park responded, CP 119-40; Apps. J & K, pp. 72-81a *infra*.

On August 27, 2004, the Honorable Sergio Armijo (to whom the matter was assigned following the August 6 grant of the motion of prejudice) heard argument, denied Clover Park's motion to vacate, and consolidated the pending related actions, CP 141-43, 8/27/04 RP 24-25; Apps. H & I, pp. 47-71a *infra*.

D. Trial Court Proceedings Regarding Discovery and Summary Judgment

Thereafter Steilacoom, CP 144-49, the State Board, CP 150-54, and the Regional Committee, CP 155-58, filed answers to Clover Park's petition, and the school district parties exchanged witness disclosures, CP 159-69, 810-54, 217-19, according to the case schedule, CP 14; App. X, pp. 127-28a *infra*.

On December 23, 2004, Steilacoom moved for summary judgment, CP 170-216. On December 28, 2004, Clover Park served initial written discovery on each of the other three parties, CP 233-43 (Steilacoom), 301-09 (Regional Committee), 442-49 (State Board), dealing primarily with the pleaded issues of the Regional Committee's compliance with Washington State's Open Public Meetings Act ("OPMA"), Ch. 42.30 RCW, App. V, p. 122-23a *infra*, and Steilacoom's asserted defenses to Clover

Park's allegations. App. V, pp. 120-21 & 123a *infra*, of illegal exacerbation of racial and socioeconomic segregation.

On January 12, 2005, Steilacoom moved to quash Clover Park's discovery, CP 220-43, on January 13 the Regional Committee filed a similar motion, CP 244-45, 249-60, and on January 13 the State Board joined in those motions, CP 246-48. Briefing by the parties followed, CP 261-317; Apps. F & G, pp. 35-46a *infra* (Clover Park's opposition).

On January 24 and 26, 2005, Clover Park submitted its response to Steilacoom's pending motion for summary judgment, CP 318-65, 382-86, 394-97.

On January 31, 2005, Clover Park served followup written discovery on the other parties and noted depositions of certain Regional Committee officials, State Board officials, and witnesses designated by Steilacoom, CP 463-544. On the same date, Clover Park moved for partial summary judgment, CP 393, 398-420, and for any appropriate adjustments to the trial date and discovery schedule, CP 373-81, 387-92.

On February 2, 2005, following oral argument, the trial court granted, with modifications, the pending motions to quash and limit Clover Park's discovery, CP 450-53, 2/2/05 RP 42-43; Apps. D & E, pp. 30-34a *infra*.

On February 3, 2005, Clover Park moved for the trial court's authorization of its discovery consistent with the court's February 2 orders, CP 460-569; App. GG, pp. 288-90a *infra*, and filed a second, multi-part motion for partial summary judgment, CP 454-59.

On February 4, 2005, following oral argument, the trial court granted Steilacoom's motion for summary judgment, CP 776-83, 2/4/05 RP 52-54; App. C, pp. 21-29a *infra*.

E. Clover Park's Appeal and Petition for Review

Thereafter Clover Park appealed. On February 22, 2006 the court of appeals affirmed the trial court's decision. App. B, pp. 2-20a *infra*. Clover Park sought discretionary review by the Washington Supreme Court, which denied

Clover Park's Petition for Review on December 5, 2006. App. A, p. 1a *infra*.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the opinion below conflicts with the decision of another state court of appeals and because the two important questions presented have not been, but should be, settled by this Court, and were decided below in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(b) & (c).

I. THE EQUAL PROTECTION CLAUSE PROHIBITS RACE-BASED PEREMPTORY REMOVAL OF TRIAL COURT JUDGES

A. The Courts of the State of Washington Declined to Consider Whether the Fourteenth Amendment Prevents Race-Based Peremptory Removal of Trial Court Judges

Both the trial court and the Washington Court of Appeals declined to consider Clover Park's contention that statutory peremptory removal of trial court judges cannot be implemented to preclude inquiry into whether the statutory process has been employed to disqualify a judge on account of race. The trial court stated:

> [I]t's a matter of right, that no reason need to be given as to why the Affidavit of Prjudice is filed.
>
> To use the Batson analysis to this type of a situation, equal protection argument and all of that, that would be brand new to the state, at least to the authorities that have been cited to me. I have not seen that analysis.
>
> There is a concern that it could, but I don't know if it's racially motivated and I'm not going to get involved in that. I'll just go back to my understanding of the statute which allows the Affidavit of Prejudice to be filed for any reason.

App. I, p. 69-70a *infra* (transcript of trial court's oral ruling).

The court of appeals took the same approach. With no analysis of constitutional considerations, the court held that "a party may file an affidavit of prejudice as a matter of right without any further showing." App. B, pp. 19-20a *infra* (slip opinion).

The Washington Supreme Court's determination not to review the court of appeals decision leaves intact the lower state courts' approach that the Fourteenth Amendment has no place in evaluating whether peremptory removal of a trial court judge is infected by racial motive: Such a contention will not even be considered.

Thus, the decision below—that it is sufficient that Washington statute provides an opportunity to file such motions and affidavits without a stated reason—amounts to a decision that even motions of prejudice that are based on openly stated racial bias are permissible because there is no constitutional interest in preventing, or remedy for, such motions. If there is no place for consideration of the Equal Protection Clause in such matters, then whether racial motivation is covertly or overtly expressed, the result is the same: Parties are wholly free to peremptorily remove trial court judges for racial reasons.

Of course, it is the rare case where improper racial motivations are openly stated, and that is why we have such a broad jurisprudence regarding the "smoking out" of covert improper racial motivation. *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

And it is difficult to conceive of how or why the Fourteenth Amendment would simply be inoperative in cases of improper racial motivation in the striking of judges: The interests of society and the judicial system in avoiding racial discrimination in judge selection appear similar to those with respect to improper racially-motivated challenges of jurors. *Johnson v. California*, 545 U.S. 162, 171-72 (2005); *People*

v. Superior Court, 10 Cal.Rptr.2d 873, 8 Cal.App.4th 688 (1992)(*Batson*-type review applicable to peremptory removal of trial court judge for allegedly racial reasons).

B. The Sequence of Events Is Powerfully Suggestive of a Racial Motive for Steilacoom's Motion of Prejudice

As summarized in the Statement of the Case above, Steilacoom filed its motion and affidavit of prejudice against the originally-assigned Judge below, the Honorable Beverly Grant, who is African-American. The order granting Steilacoom's motion should have been vacated upon Clover Park's responsive motion, which raised an Equal Protection objection, under *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, to peremptory removal of a trial court judge for reasons including racial reasons.

The trial court, in hearing Clover Park's motion to vacate, did not address the constitutional issue, 8/27/04 RP 24-25; Apps. H & I, pp. 48a, 69-70a *infra*. All evidence was presented by affidavit or declaration, and thus the record can be examined and an appropriate determination made *de novo* by this Court.

Once that examination is made, the case should be reversed and remanded, and the proceedings in the trial court begun anew. The totality of the evidence yields a conclusion that race was a part of Steilacoom's reason for filing its affidavit of prejudice, and no showing was made that the same action would have been taken in absence of the racial motivation. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n. 21 (1977).

Steilacoom's motion of prejudice against Judge Grant came after Steilacoom had ridiculed, before both the Regional Committee and the State Board, Clover Park's claims that the territory transfer at issue would exacerbate racial and socioeconomic segregation, and exacerbate property-wealth disparities, and that the constitutional dimension of those effects was important and should be considered. AR 179-83 (Clover Park letter to Regional Committee); AR 974; App. 2, p. 148a *infra* (Steilacoom calls

Clover Park arguments "baloney"), AR 121 ("bravado"). The readily-obvious segregative effects of the territory transfer were asserted by Clover Park before the Regional Committee and not even disputed by Steilacoom there. Clover Park pressed its claims of illegal segregation (based substantially on the Washington Constitution) as part of its court appeal from the administrative decisions below, CP 24; App. V, pp. 120-21a *infra*, and it was hardly surprising--in fact, it was entirely predictable--that Steilacoom was reluctant to take the chance that Judge Grant would be put off by Steilacoom's cavalier pronouncements regarding such fundamental interests of Clover Park's high-minority, high-poverty student body, or that Judge Grant would consider seriously and conscientiously the issues raised by Clover Park's appeal.

C. Steilacoom Did Not Dispel, But Rather Amplified, the Appearance of a Racial Motivation

Steilacoom was directly challenged to refute the inference of improper purpose created by this background: Clover Park pointed out in its briefing that Steilacoom could provide sworn evidence from the person who filed the affidavit of prejudice, stating race played no part at the time the affidavit was filed, or could even acknowledge (more plausibly) that race was a factor, but assert on oath that the same decision would have been made in absence of that factor. CP 122; App. J, p. 76-77a *infra*.

Rather than provide direct evidence from the person who filed the motion and affidavit of prejudice, Steilacoom continued to assert in briefing that race was not a factor in its decision and offered only post-hoc reasons for its motion and affidavit. Moreover, its stated reasons for the motion and affidavit were nonsensical and shifted: First, it was because Judge Grant used to litigate against school districts (even though both main parties here are school districts). App. J, p. 77a; App. K, p. 80a *infra*. Later, after it was discovered that Steilacoom had failed to affidavit Judge Grant in another case, it was because Judge Grant litigated claims of wrongdoing against school districts. App. J, p. 75a,;App. K, p. 77a *infra*.

Never did Steilacoom produce direct evidence under oath (as would have been easy to do if the evidence were truthful), specifically keyed to the time of the decision to affidavit Judge Grant, and directly from the person who filed the motion and affidavit of prejudice, that either denied that race was a factor or acknowledged that race was a factor but asserted the same decision would have been made even without the racial consideration.

This conspicuous failure is similar to the situation discussed in *Johnson v. California*, 545 U.S. 162, 171 n. 6 (2005) (refusal to respond to inquiry provides additional support for inference of discrimination).

D. The Record Supports Reversal of the Judgment Below

Thus, the totality of the evidence indicates that race played a part in Steilacoom's motion and affidavit of prejudice against Judge Grant.

An improper motivation for striking a judge invalidates the proceedings below, for otherwise there would be no remedy for the constitutional violation. *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005).

II. THE TRIAL COURT'S ORDERS QUASHING CLOVER PARK'S DISCOVERY, AND THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT BEFORE CONSIDERING CLOVER PARK'S INTERMEDIATE APPLICATION FOR DISCOVERY, DENIED CLOVER PARK DUE PROCESS

A. Clover Park Has Consistently Asserted Its Right to Pursue Open Meetings Violations, and Pursue Defenses to Allegedly Unconstitutional Actions, Using Normal Civil Discovery Outside the Administrative Process

Clover Park has consistently taken the position in this matter that constitutional due process protects its right to ordinary civil discovery where it seeks to pursue substantial indications of violations of Washington State's Open Public

Meetings Act ("OPMA"), Ch. 42.30 RCW; seeks to gather evidence related to a constitutional defense belatedly raised by Steilacoom outside the administrative record before the Regional Committee; and has not limited its claims to those confined by the so-called "administrative record" but has instead also invoked the general jurisdiction of the courts to consider the issues that could not have been developed before the Regional Committee. Apps. F, G, DD, EE, & FF, pp. 35-42a, 44a, 240-42a, 256-58a, & 282-83a *infra*.

Neither of the main issues that Clover Park sought to address in its discovery could be addressed in the context of the Regional Committee's "administrative" process. They were addressed afterward, in court, App. V, p. 123a *infra* (independent pleading of allegations), because neither the OPMA claims, nor Steilacoom's "no intentional discrimination" defense to the racial segregation issue (first asserted before the State Board), could be pursued before the Regional Committee or the State Board. There was no provision for formal discovery in either "administrative" setting.

Both the trial court and the court of appeals declined to analyze Clover Park's asserted due process right to pursue some of its claims, and some of Steilacoom's defenses, independently outside the administrative process. Thus, as with the peremptory removal of judges issue, Clover Park's claims have been denied through nonconsideration.

B. Clover Park Seeks to Vindicate Substantial State-Conferred Interests

Clover Park's interest, and the interest of its students, in the outcome of these proceedings are significant. The effect of the territory transfer at issue will be to substantially diminish Clover Park's ability to raise needed general and capital funding for operation and upkeep of its schools, and will also be to substantially increase racial and socioeconomic isolation in the schools affected by the transfer.

If the Regional Committee did violate the OPMA in the course of reaching its decision, that decision is void,

RCW 42.30.060(1). Thus, Clover Park's interest in developing through discovery the indications of violation already apparent on the record—which would be a routine matter of course in any other lawsuit alleging OPMA violations--is a critical one. And it is one that is conferred by Washington statute separate and apart from the statutory administrative process by which the Regional Committee and State Board reached their decisions.

Under Washington law, Clover Park may represent the interests of its students as to the segregation and school funding issues at the heart of this dispute. *Seattle School District No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978). See also *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982)(school district may invoke Fourteenth Amendment to resist segregative state law). Not only Clover Park's students have a property interest in education protected here by due process, *Goss v. Lopez*, 419 U.S. 565 (1975): Clover Park does as well.

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), teaches that procedural due process attaches on deprivation of a state-created property or liberty interest. Clover Park's financial interest in the "ample provision" of education guaranteed by the State Constitution is such a state-conferred interest, *Seattle School District No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978), and Clover Park's opposition to the territory transfer at issue in this matter is based in substantial part on the uncontested adverse economic effects the transfer will cause.

C. Without Normal Civil Discovery, Clover Park Is Deprived of Any Meaningful Opportunity to Advance Its Claims or Probe Steilacoom's Constitutional Defenses

Due process demands that a party have a meaningful opportunity to contest the factual basis of disputed issues and a meaningful opportunity to offer evidence on its side. The right to procedural due process is absolute, and does not depend on the merits of a claimant's substantive assertions, in part because of the importance to organized society that

procedural due process be observed. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Carey v. Piphus*, 435 U.S. 247, 266-67 (1976).

As established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), resolving the issue of sufficient process prior to a legal outcome requires consideration of (1) the nature and magnitude of the interest that will be affected by the official action, (2) the risk of erroneous deprivation of a protected interest if erroneous procedures are used and the probable value of additional procedural safeguards, and (3) the nature of the government's interest, including fiscal and administrative burdens, that the additional procedures would entail. "Due process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Here, the particular situation demands that Clover Park be afforded the normal civil discovery that would accompany its allegation, made separate from the "administrative process," that the Regional Committee violated the State's OPMA. And because Steilacoom, after the record before the Regional Committee had closed, first contended to the State Board, and later to the trial court, that the undisputed segregative effects of the territory transfer were legal in absence of proof of discriminatory purpose, Clover Park is entitled to develop that issue using normal discovery as well.

Under the *Mathews* factors, the magnitude and nature of Clover Park's interests are significant: Satisfaction of Clover Park's state constitutional interests in adequate school funding, and in avoiding student racial segregation, are at stake; the risk that these interests will be erroneously trammeled is very high when there is no meaningful opportunity to develop, in ordinary fashion, core issues, and the probable value of the "additional safeguards" of normal civil discovery is thus very high; and the fiscal and administrative burdens on the State of permitting, rather than prohibiting, its normal civil litigation processes is negligible.

The opportunity to develop and respond to the issues in a legal proceeding according to normal rules of court is fundamental to due process. *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000). Paraphrasing *Nelson, id.* at 467, the court rules and the due process for which they exist demand a more reliable and orderly course than has been pursued here. While the funding implications of Clover Park's claims may be uncomfortable for the State of Washington, that is not sufficient reason to suspend ordinary legal processes and constitutional guarantees.

CONCLUSION

For the reasons described above, the Court should grant Clover Park's petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 5th day of March, 2007.

Michael W. Hoge
Counsel of Record
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
(206) 359-8000
Attorneys for Petitioner Clover Park School District

APPENDIX

APPENDIX A – ORDER OF THE SUPREME COURT OF WASHINGTON ENTERED DECEMBER 5, 2006

THE SUPREME COURT OF WASHINGTON

CLOVER PARK SCHOOL DISTRICT NO. 400 Petitioner, v. WASHINGTON STATE BOARD OF EDUCATION, PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1, Respondents.	NO 78492-2 **ORDER** C/A NO. 32953-1-II

Department I of the Court, composed of Chief Justice Alexander and Justices C. Johnson, Sanders, Chambers and Fairhurst, at its December 5, 2006, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of December, 2006.

For the Court

/s/
CHIEF JUSTICE

APPENDIX B – OPINION OF THE WASHINGTON STATE COURT OF APPEALS, DIVISION II, FILED FEBRUARY 22, 2006

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CLOVER PARK SCHOOL DISTRICT NO. 400 Appellant v. WASHINGTON STATE BOARD OF EDUCATION, PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1, Respondents.	No. 32953-1-II UNPUBLISHED OPINION

PENOYAR, J. — Clover Park School District No. 400 (Clover Park) appeals a decision from the Puget Sound Educational Service District Regional Committee (Committee) transferring some of its territory to Steilacoom Historical School District No. 1 (Steilacoom). We reject Clover Park's claims on appeal. We hold that the Committee's decision did not unconstitutionally exacerbate property tax disparities and increase racial and socioeconomic isolation, that good faith negotiations took place before the transfer, that the committee did not misinterpret the law, and that the committee did not violate

the laws on open meetings. We also hold that the Washington State Board of Education did not err in approving the transfer. Finally, we uphold Steilacoom's affidavit of prejudice against the original trial judge because a party can file the affidavit as a matter of right without stating any cause. We affirm.

FACTS AND LEGAL FRAMEWORK

The disputed territory, Northwest Landing, is being developed as a mixed-use master planned community within the City of DuPont. When the residential area is fully developed, Northwest Landing is expected to generate approximately 230 school age students. The current boundaries place almost all of the commercial property in Clover Park and almost all of the residential community within Steilacoom.[1]

In 1999, the legislature provided that master planned communities should be included in one district when possible. RCW 28A.315.205(4)(c); LAWS OF 1999, ch. 315 § 402.

In April 2003, Steilacoom filed a petition with the Puget Sound Educational Service District (ESD) to transfer territory from Clover Park to itself. This action triggered the process set forth in RCW 28A.315 for determining if and

---

[1] Clover Park argued to the Committee:

> DuPont is now planned and zoned heavily for business. This is true for both the Steilacoom Historical School District portion of the city and for the Clover Park School District portion . . . . The City of DuPont and Steilacoom Historical School District will receive a property tax windfall as a result of the development of these business properties. The proposed transfer would increase the magnitude of Steilacoom Historical School District's windfall at the expense of Clover Park School District.

Administrative Record at 374.

how a transfer will occur. The ESD superintendent notified Clover Park about Steilacoom's petition and notified both school districts of their statutory duty to negotiate how the transfer should take place.

The school districts met on August 4, 2003, and again on August 18 to try to negotiate a settlement. On August 4, Clover Park asked Steilacoom to provide more information. Steilacoom refused, saying it would wait and present the information to the ESD. Steilacoom insisted that it had a mandate from the City of DuPont to put all its children into one school district. Steilacoom presented Clover Park with an amended proposal, dated August 1, and the two sides agreed to meet on August 18 after Clover Park had more time to review it.

On August 18, Clover Park said it did not consider the August 1 proposal to be different from Steilacoom's original petition. Clover Park suggested that the housing development be kept together, but remain within Clover Park. Steilacoom refused, saying the City of DuPont wanted all its children in the Steilacoom School District. Steilacoom said it had made its "best and final proposal right up front." Administrative Record (AR) at 706. Clover Park received a 30-day extension for future negotiations. On September 11, 2003, Steilacoom informed the superintendent that they were unable to reach an agreement and asked for a hearing before the ESD Regional Committee on School District Organization.

In preparation for the hearing, the Committee sent each scho trict a checklist with a series of questions about the proposed transfer. It drew the checklist items directly from the statutory factors the Committee is required to consider and use as a basis for its decision regarding a proposed transfer. Both parties submitted responses to the Committee, and the Committee compiled a chart comparing those responses. The Committee held public hearings on

Appendix B

November 5 and 25, 2003, January 23, 2004 (a subcommittee meeting), and March 3, 2004.

At the November hearings, the Committee heard testimony from the districts and other interested parties. It heard testimony that the Steilacoom School District had higher test scores and that the City of DuPont wanted to be served by a single school district. Clover Park argued that its district contained more minority students who came from lower income households and that the transfer would increase Clover Park's racial and socioeconomic isolation. Clover Park also told the Committee that its taxpayers already pay a higher rate, and this rate would go up after the transfer.[2]

---

[2] Clover Park the following information to the Committee:

> Steilacoom Historical currently has 1.7442 times as much assessed valuation per pupil as does Clover Park. Removing the high-value commercial properties in the area proposed for transfer would make this situation worse. The proposed transfer would not increase levy (i.e. local tax) funding available to Steilacoom; it would merely reduce tax rates. Steilacoom's 18.38% reduction in levy and bond rates would be at the cost of a 6.68% increase in Clover Park's rates. This would add to the current disparity in the tax rates of the two districts: Clover Park homeowners already pay $3.7968/thousand for school M&O [maintenance and operation] levies, while Steilacoom's pay $2.8675/thousand. The proposed transfer would raise Steilacoom's assessed valuation per student to 2.2794 times Clover Park's, and that discrepancy would continue to grow as more commercial facilities are built in DuPont!
>
> A second-order effect of the transfer would be an increased cost to the state in the form of additional Local Effort Assistance to Clover Park. Because Clover Park has a per-student assessed valuation which is below the state average, it receives these "levy equalization" funds from the state. Since the proposed transfer would leave Clover Park even farther below the state average assessed valuation, it would receive more of this funding . . . Steilacoom's assessed valuation per

Clover Park further argued that Steilacoom was also receiving land and revenues from the developer as part of the developer's mitigation agreement. Steilacoom responded that Clover Park receives substantial federal assistance for serving Fort Lewis's educational needs, so Clover Park's per-pupil funding is actually higher than Steilacoom's.

On November 25, 2003, the Committee voted to approve the transfer. Because the Committee wanted to explore mitigation of the financial impact on Clover Park, it formed a subcommittee to determine the terms of the transfer of assets. The subcommittee recommended making the transfer effective on September 1, 2008, so that children could attend Steilacoom schools at the beginning of the school year. The effective date for the tax revenue transfer will be January 1, 2010. On March 3, 2004, the Committee voted to accept the subcommittee's recommendations. On March 25, 2004, the Committee issued its written findings and decision to approve the transfer.

The day before the March 3, 2004, meeting at which the Committee approved the final terms, Steilacoom advised the ESD that its legal description of the transfer territory had erroneously included property belonging to the federal government. Steilacoom sent a corrected legal description that did not include the federal property.

Clover Park appealed the Committee's decision both to Pierce County Superior Court and to the Washington State Board of Education (Board). The Board found that the Committee's decision was not arbitrary and capricious and that the Committee followed applicable procedures. The Board declined to consider Clover Park's constitutional

---

student is above the state average, so it does not qualify for Local Effort Assistance.

AR at 373.

claims because those claims were "outside the Board's purview in considering boundary transfer appeals." AR at 2. The Board noted that it could only consider the two bases for appeal listed in RCW 28A.315.205(5).

Clover Park then appealed the Board's decision to Pierce County Superior Court as well. The superior court consolidated the appeal of the Board's decision with the appeal of the Committee's decision.

Steilacoom filed an affidavit of prejudice against the judge initially assigned to the case, Judge Beverly Grant. The court transferred the case to Judge Sergio Armijo. Clover Park opposed the affidavit of prejudice, claiming Steilacoom filed it for racial reasons because it did not want an African American judge hearing the case.

Steilacoom responded that it challenged Judge Grant because her practice had emphasized litigation against school districts, "including claims alleging that a district was liable for malfeasance and/or mistakes." Clerk's Papers (CP) at 81. Judge Armijo denied Clover Park's motion to vacate the order granting Steilacoom relief. He determined that an affidavit of prejudice is a matter of right for which no reason need be given. He declined to perform any equal protection analysis as Clover Park had urged.

After Steilacoom filed a motion for summary judgment, Clover Park served it with interrogatories and requests for production. Steilacoom moved to quash these discovery requests. Clover Park then moved for partial summary judgment based on Steilacoom's failure to negotiate in good faith during the August 2003 meetings.

The superior court entered orders limiting discovery and quashing Clover Park's interrogatories and requests for production. It then granted Steilacoom's motion for summary judgment. Clover Park now appeals.

Appendix B

ANALYSIS

I. Scope and standard of review for the Committee's decision

Clover Park assigns error to the trial court's order granting Steilacoom's motion for summary judgment.

On review of an order for summary judgment, the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The standard of review is de novo. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Like the trial court, we will review the Committee's and the Board's decisions under the Administrative Procedures Act's (APA) judicial review provision. RCW 34.05.570. Agency determinations of school district boundaries are quasi-legislative proceedings, not quasi-judicial proceedings in which administrative tribunals are adjudicating rights. *Evergreen Sch. Dist. No. 114 v. Clark County Comm. on Sch. Dist. Org.*, 27 Wn. App. 826, 832, 621 P.2d 770 (1980). Nevertheless, judicial review is still under RCW 34.05.570(4).

II. Constitutional and statutory violations through funding disparities

Citing article IX, sections 1 and 2 of the Washington Constitution,[3] Clover Park claims the Committee's decision

---

[3] Article IX deals with education. Section 1 says the state's "paramount duty" is to make "ample provision for the education of all children . . . without distinction . . . on account of race, color, caste, or sex." WASH. CONST. ART. IX, § 1. Section 2 says that the legislature shall "provide for

to allow the transfer violates the Washington Constitution because it exacerbates existing property tax disparities between the affected districts "in a setting in which the State does not furnish ample funding, from regular and dependable tax sources, for school district capital needs." Brief of Appellant (Br. of App.) at 16. Clover Park describes the financial problems the transfer will create, but it does not explain how or why the transfer violates the state constitution. Therefore, we cannot hold, as Clover Park seems to suggest, that the Committee's decision somehow constitutes an unconstitutional failure to fund the schools.

Clover Park also claims this transfer contradicts RCW 28A.315.015(2) and .205(4), which express the legislature's intent to reduce financial disparities between districts. Steilacoom responds that those statutes list economic equality among the districts as one of many elements the Committee should consider.

The record indicates that the transfer of taxable property away from Clover Park did concern the Committee. To mitigate the financial impact, it formed a subcommittee to recommend how to transfer assets in a way that would reduce the burden on Clover Park. The subcommittee recommended delaying the transfer of assets until January 2010, but allowing students in the transfer area to begin attending Steilacoom schools in September 2008. This unusually long delay was intended to give Clover Park time to adjust.

Here, the record reflects that the Committee properly considered the financial effects of the proposed transfer on both school districts. The checklist the Committee used properly informed the Committee of the various factors it should weigh in making its decision. The balancing process

---

a general and uniform system of public schools." WASH. CONST. ART. IX, § 2.

in this case satisfied all constitutional, statutory, and administrative rule requirements relating to financial concerns.

III. Constitutional violation because of racial segregation

Clover Park claims the transfer also violates the Washington Constitution because it will worsen the affected districts' racial and socioeconomic isolation. It contends that Washington law disfavors segregation and that an intent to segregate is not necessary to violate Washington's Constitution.

Clover Park does not cite to any evidence in the record to support its assertion that the transfer would exacerbate existing racial or economic divisions. Even if the record showed a disparate impact on minorities, this would not establish an equal protection violation. To establish an equal protection violation, one must show a discriminatory intent as well as a disparate impact. *State v. Coria*, 120 Wn.2d 156, 175, 839 P.2d 890 (1992); *State v. Clark*, 76 Wn. App. 150, 156, 883 P.2d 333 (1994). Here, we do not need to reach the issue of intent because Clover Park has not offered statistics or other evidence to show disparate impact. *See Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wn.2d 675, 681-82, 724 P.2d 1003 (1986). Without knowing the racial composition of the current student bodies, or how the addition of the children from Northwest Landing to Steilacoom would affect that composition, we have no way to evaluate the transfer's effect.

IV. Negotiations

Clover Park claims that the decisions of the Committee, the Board, and the trial court must be remanded because Steilacoom failed to negotiate in good faith. Clover Park says Steilacoom maintained an "all-or-nothing

approach" during the negotiation sessions and refused to share information supporting its petition. Br. of App. at 25.

Clover Park also argues that the ESD superintendent incorrectly told the districts that they "must negotiate on the entire proposed transfer of territory." Br. of App. at 22; AR at 215. RCW 28A.315.195(5)(b) requires the districts to negotiate on the entire proposed transfer in the case of a citizen-initiated petition. It does not require this of district-initiated petitions, and so Clover Park asserts that the superintendent should have informed the parties that compromise was possible.

In this case, the superintendent followed the statute by notifying the parties by letter of their obligation to negotiate and the other provisions of RCW 28A.315.195. He took the added step of requiring the districts to provide a copy of the minutes and a summary of their sessions as an assurance of negotiation. Even though the districts may not have been required to negotiate on the entire proposed transfer, the superintendent did not seriously err in citing the language from RCW 28A.315.195(5)(b) to them. He enclosed a copy of the statute so the parties could also read for themselves their exact statutory obligations.

While the law requires that the parties negotiate, it does not require that these negotiations be successful or that either party change its position. In this case, the districts met twice but were unable to reach an agreement. The record does not reflect bad faith on Steilacoom's part, only a refusal to compromise its position. Thus, we find sufficient evidence that the parties fulfilled their obligation to negotiate, and the superintendent adequately performed his duty.

Appendix B

V. Did the Committee's checklist misinterpret the law?

Clover Park claims the Committee erroneously interpreted and applied the law because the "checklist" it used and voted on improperly emphasized the "master planned community" consideration. Specifically, it asserts that the checklist the Committee used to track the statutory criteria devotes three questions to the "master planned community" consideration but pays scant attention to the issue of reducing the financial disparities between the two districts. Clover Park says the Committee members incorrectly thought that the master planned community consideration was decisive or that the law required them to approve the petition. Finally, Clover Park claims that this consideration of master planned communities was improper because Northwest Landing is not yet developed so it cannot yet be considered a "planned" community.

A. Master planned communities

The checklist the Committee developed tracks the statutory language from RCW 28A.315.205, .015, and WAC 180-24-00701. RCW 28A.315.205(4)(c) includes master planned communities (MPCs) as a consideration, so it was clearly appropriate for the checklist to deal with them. The checklist mentions MPCs twice and arguably references them a third time.[4] However, this does not mean that the Committee gave inappropriate weight to MPC considerations. Several committee members mentioned that MPC considerations were only one of many factors.

---

[4] CP at 443, checklist items numbered 3-5.

Clover Park is correct that the statutes do not specifically require the Committee to consider whether the *entire* MPC would benefit from a transfer between districts. *See* RCW 28A.315.205; .015. But RCW 28A.315.205(c) expresses a legislative preference for keeping an entire MPC within one school district. Committee members noted this in their deliberations, and one member even suggested that the legislature amended the law in reaction to this particular case. Other committee members found practical reasons for keeping an MPC all in one district. We believe that the Committee properly applied the statutes regarding this issue.

Finally, even though Northwest Landing is still in the development phase, the Committee properly considered it an MPC. The statute does not require the MPC to be complete but refers specifically to MPCs "that were or *are to be developed* pursuant to an integrated commercial and residential development plan." RCW 28A.315.205(4)(c) (emphasis added).

B. Reducing financial disparities

Clover Park is correct that the issue of reducing financial disparities is mentioned fewer times on the checklist than it is in the statutes. RCW 28A.315.205(4)(e) and .015(2)(c) say that the committee should consider "equalization among school districts of the tax burden for general fund and capital purposes through a reduction in disparities in per pupil valuation" and "reducing existing disparities among the affected school districts' ability to provide operating and capital funds through an equitable adjustment of the assets and liabilities." The checklist boiled these two provisions down to one: "Would approval of the proposed transfer result in a reduction in disparities in per pupil valuation when all funding sources are considered?" AR at 444.

Appendix B

The record here does not support a finding that the Committee misused the checklist or that the checklist misstated the law. Rather, the record supports a finding that the Committee used the checklist to appropriately balance the various factors necessary to its decision.

Despite minor deviations from the statute, the checklist addressed all the statutory considerations adequately. Therefore, the Committee properly applied the law.

VI. Violations of the Open Public Meetings Act

A. The Committee's motion failed to cite the proper statutes

Although it does not explain how this violates the open meetings laws, Clover Park claims error because the Committee member's motion to transfer territory only referenced the statutory criteria in RCW 28A.315.205 when it should have also referenced RCW 28A.315.015(2) and WAC 180-24-00701. As a corollary, Clover Park takes issue with the Committee relying on the checklist as "the vehicle according to which `meeting the criteria' was assessed." Br. of Appellant at 38-39.

Because RCW 28A.315.205 incorporates RCW 28A.315.015(2) by reference, we find no error in citing only RCW 28A.315.205. As we already noted, using the checklist was proper because the list accurately incorporated the statutory criteria.

B. Written findings

Clover Park claims that the Committee's decision is void because it violated the Open Public Meetings Act. As evidence, Clover Park says that the reasons the Committee gave in its written findings differed substantially from the

factors it discussed at the meeting. Steilacoom and the Committee both respond that the Committee's written decision is not materially different from its oral ruling.

A fair reading of the written findings supports Steilacoom and the Committee. The findings are taken almost verbatim from RCW 28A.315.015(2) and .205(4). Because the checklist used during the meetings drew heavily from these statutory factors, the written findings also track the checklist. Only finding number three was not explicitly on the checklist, although it was implied in question number ten. The numbering on the findings is different from the checklist because the checklist incorporated WAC 180-24-00701 more explicitly and because the checklist divided some of the statutory provisions into several different items. Because the written findings adequately summarized the factors the Committee considered, the findings are not evidence of wrongdoing.

C. Committee members' contact outside the public meetings

Clover Park also contends that comments the Committee chair made at the meeting demonstrate that she had outside contact with the other Committee members.

At the March 3, 2004, Committee hearing, the chair said in her opening remarks:

> We [the committee] also all received a copy of two pieces of information. Each district sent out something in -- new information or other information they wanted us -- and we decided that -- it was distributed to all of us. We've all had it, well, quite a while, a week or so. And I know all -- I'm correct that all the members have read this information both -- from the two districts. So we have that information in front of us.

AR at 966-67. Clover Park says the chair could not have known the members read the information unless she had some contact with them outside the open meeting. Clover Park suggests that it should have been allowed further discovery on the issue.

The Committee responds that the chair was simply noting for the record what documents the Committee had received and would consider. She assumed that the members had read the materials sent to them.

According to statute, "[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030. "Meeting" means meetings at which action[5] is taken. RCW 42.30.020(4). Simply calling to confirm that a member has received relevant information is not "action," and so this contact does not constitute a "meeting."

Any action taken at meetings failing to comply with the open meetings law is void. RCW 42.30.060(1). Clover Park has not shown that illegal deliberations on the statutory elements took place (see part VI, B above). Even if the chair did contact other members to ensure they were prepared for the meeting (something that does not necessarily follow from what the chair said), there is nothing in the record to indicate that members discussed any of the merits of this case outside the open meetings. Clover Park fails to show that a violation of the open meetings law occurred.

---

[5] "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.
RCW 42.30.020(3)

Appendix B

VII. Legal description of the transfer area

Clover Park next claims procedural error because the transfer the Committee approved contained an incorrect legal description of the property being transferred.

Steilacoom argues that a technical error in the legal description is not sufficient to invalidate the Committee's decision. Because the federal property it inadvertently included is not taxable, the error had no practical effect on the substance of the petition. Also, all parties knew about the error from the beginning, and Clover Park was not prejudiced.

For the reasons Steilacoom gives, we hold that the technical error in the legal description is not sufficient to require reversal of the Committee's decision to transfer territory.

VIII. State Board decision

Clover Park claims the Board's decision was unlawful because it failed to make specific findings and conclusions as to each of Clover Park's contentions. It also claims the Board failed to cite evidence to support its conclusion that the Committee's decision was not arbitrary and capricious, even though the APA, as codified at RCW 34.05.461(3) and (4), requires the Board to do so.

The Board responds that RCW 28A.315.205(5), and not the APA, defines the scope of its review of Committee decisions. The Board also says its review under RCW 28A.315.205(5)(a) is not an agency adjudicative proceeding because it has no power to enter orders establishing school district boundaries and because the Committee is a non-APA agency.

We hold that the Board acted properly. RCW 28A.315.205(5)(a)(ii) specifies that the Board reviews the Committee decision to determine whether all applicable procedures were followed and whether the Committee acted in an arbitrary and capricious manner. If the Board finds a procedural defect or arbitrary or capricious decision making by the Committee, its only recourse is to refer the matter back to the Committee with an explanation of its findings. RCW 28A.315.205(5)(a)(ii). Here, the Committee acted properly in developing the checklist and deliberating on all the statutory factors. Although the Board does not have explicit authority to hear constitutional claims, a decision motivated by flagrant racism would probably be void as arbitrary and capricious. Clover Park has not provided evidence of blatant racism, so this is not an issue.

We need not analyze whether the Committee is a "non-APA agency" because RCW 28A.315.205(5)(b) specifically calls for further judicial review of the Committee's decision "in accordance with RCW 34.05.570," the APA judicial review statute.

IX. Discovery

Clover Park claims that the trial court abused its discretion and denied it due process when it refused its request to obtain discovery about violations of the open meetings law. It also says it needed further discovery regarding racial and socioeconomic isolation in order to support its constitutional claims.

The trial court has the discretion to limit its review to the administrative record before it. *See* RCW 34.05.566(6); *Wash. Independent Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002), *aff'd*, 149 Wn.2d 17, 65 P.3d 319 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *In*

the Matter of the Personal Restraint of Davis, 152 Wn.2d 647, 691, 101 P.3d 1 (2004).

In this case, the court determined that discovery was highly unusual and that it had no reason to depart from the standard practice of reviewing only the administrative record. Clover Park has made no offer of proof as to what information it hoped to add to the record. Thus, the trial court properly limited itself to the record before it, and did not abuse its discretion or deny Clover Park due process.

X. Affidavit of prejudice against the original trial judge

Clover Park argues that the trial court should have vacated the order granting Steilacoom's affidavit of prejudice because race was part of Steilacoom's reason for filing its affidavit and motion of prejudice. At this time, no reported Washington case deals with the question whether an affidavit of prejudice is improper when a party allegedly files it for racially discriminatory reasons.

Under RCW 4.12.040 and .050, a litigant has the right to disqualify a trial judge once in each case, without establishing actual prejudice, if the statutory requirements of RCW 4.12.050 are met. *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 285, 803 P.2d 798 (1991); *State v. Waters*, 93 Wn. App. 969, 974, 971 P.2d 538 (1999). According to statute, the party must file a motion, supported by an affidavit that the judge before whom the action is pending is prejudiced against that party or its attorney, so that the party believes that it cannot have a fair and impartial trial before the judge. RCW 4.12.050. Such a motion and affidavit seasonably filed presents no question of fact or discretion. *State v. Dixon*, 74 Wn.2d 700, 702, 446 P.2d 329 (1968).

Once a party timely complies with the terms of these statutes, prejudice is deemed established "and the judge to

whom it is directed is divested of authority to proceed further into the merits of the action." *Harbor Enters.*, 116 Wn.2d at 285 (citing *State v. Dixon*, 74 Wn.2d at 702). Under the plain wording of the rule, the judge loses all jurisdiction over the case. *Harbor Enters.*, 116 Wn.2d at 285.

In this case, Steilacoom obtained a new judge because it complied with the statutory requirements. The trial court believed this to be a matter of right. We agree that a party may file an affidavit of prejudice as a matter of right without any further showing.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/
Penoyar, J.

We concur:

/s/
Bridgewater, J.

/s/
Van Deren, A.C.J.

APPENDIX C – ORDER GRANTING STEILACOOM'S MOTION FOR SUMMARY JUDGMENT ENTERED FEBRUARY 4, 2005

HONORABLE SERGIO ARMIJO

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	NO. 04-2-07167-0 and NO. 04-2-10015-7 ORDER GRANTING STEILACOOM HISTORICAL SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came on for hearing before the Honorable Sergio Armijo pursuant to Steilacoom Historical School District's ("Steilacoom's") motion for summary

judgment of dismissal. The Court, being fully advised, has considered the following submissions:

1. The Amended Appeal of Clover Park School District ("Clover Park") from State Board of Education's and Regional Committee's Decisions, with attached administrative orders;

2. Steilacoom's Motion for Summary Judgment;

3. The Certified Administrative Record ("the Record");

4. Clover Park's Opposition to the Motion for Summary Judgment;

5 Steilacoom's Rebuttal in Support of Summary Judgment; and

6. The remaining court file in this matter.

FINDINGS AND CONCLUSIONS

Based on review of the above-referenced materials and the argument of counsel in open court on February 4, 2005, the Court makes the following findings and conclusions:

Procedural Posture and Standard of Review

1. This appeal challenges two administrative orders: 1) a Regional Committee's decision to grant a school district's application to transfer certain territory from one district (Clover Park) to the petitioning district (Steilacoom); and 2) the subsequent State Board order upholding the Regional Committee's decision.

Appendix C

2. Clover Park sought judicial review by this Court under the Washington Administrative Procedures Act ("APA") of both the Regional Committee's decision and the State Board's order affirming that decision.

3. Jurisdiction over this proceeding is conferred by and limited to the provisions of the APA.

4. Review of an administrative order is confined to the agency record.

5. To the extent that Clover Park invokes the Court's inherent authority under the Constitution to review agency action, such review is also conducted on the basis of the administrative record compiled below.

6. Administrative orders are entitled to a measure of deference. The party seeking judicial review of the agency's order, in this case Clover Park, bears the burden of proving that the administrative order is marred by a specific error for which the APA allows judicial relief.

7. The Court may decide an APA petition pursuant to a motion for summary judgment, applying the APA's standards of review to the administrative record. The motion for summary judgment is an appropriate procedural vehicle for deciding the case on the basis of the administrative record without a trial.

The Regional Committee's Decision

8. Chapter 28A.315 RCW and its implementing regulations set forth the parameters of the Regional Committee's consideration of school district boundary adjustments. As articulated in the statute, the Regional

Appendix C

Committee is directed to make its decision using its "best judgment" in the consideration of certain factors described in RCW 28.315.015(2), RCW 28A..315.205(4), and WAC 180-24-00701.

9. The Regional Committee properly interpreted the law and applied it to Steilacoom's petition and the Record created before it. The Regional Committee properly considered each of the factors set forth in RCW 28A.315.015(2), RCW 28A.315.205(4), and WAC 180-24-00701, and found that, on balance, the transfer of territory would best achieve the statutory objectives and benefit the students in the transfer area.

10. The Regional Committee has considerable discretion in deciding transfer petitions. The Regional Committee's consideration and weighing of the statutory factors was an appropriate exercise of that discretion and a proper application of the law.

11. The Regional Committee gave appropriate weight to the master planned community factor, which allowed it to consider the consolidation of Northwest Landing into a single school district as part of the evidence supporting a transfer.

12. The Regional Committee's Checklist is a fair restatement of all of the statutory and regulatory concepts and its use by the Regional Committee is proper.

13. To the extent the Committee interpreted the governing statute by weighing the statutory factors or in using a checklist, the Regional Committee properly interpreted and applied the law. *See Heinnziller v. Department of Health*, 127 Wn,2d 595, 602, 903 P.2d 433

(1995); *Seatoma Convalescent Center v. Department of Soc. & Health Servs*, 82 Wn App. 495, 518, 919 P.2d 602 (1996).

14. The Regional Committee's decision was based on and is supported by the Record.

15. The Regional Committee's decision to approve Steilacoom's petition was based upon a cumulative analysis of all of the relevant criteria and the evidence presented by both parties.

16. The Regional Committee's decision, which was based on all information presented, was not arbitrary or capricious.

17. There are no grounds to overturn the Regional Committee's decision on the basis of a technical error in the legal description of the property to be transferred.

18. The Regional Committee did not violate any applicable procedure during the pre-hearing negotiation phase or the hearing, or in its decision making process.

The State Board's Decision

19. The State Board properly reviewed the determination and affirmed the Regional Committee's decision.

20. RCW 28A.315.205(5)(a)(i), which governs the State Board's review, only allows the Board to reverse the Regional Committee's decision on two grounds: that the Regional Committee failed to follow the applicable statutory and regulatory procedures or acted in an arbitrary and capricious manner.

Appendix C

21. The State Board fulfilled its statutory duty to review the Regional Committee's decision and the parties' arguments and make findings and conclusions regarding whether the two potential grounds for reversal were present.

22. The State Board properly found that that all applicable procedures were followed and the Regional Committee did not act in an arbitrary and capricious manner.

23 The State Board's findings address all material issues raised by Clover Park in its appeal to the Board under RCW 28A.315.205(5)(a)(i). More extensive or formal findings are not necessary, as no particular formality is required.

24 The State Board's order was reached through lawful procedures and decision-making processes, and are not inconsistent with precedent.

Constitutional Claims

25. There has been no showing that the administrative decisions in this case violate any constitutional provision.

26. There is no Record evidence to support Clover Park's assertion that the transfer would exacerbate existing racial or economic divisions.

27. Even if there were Record evidence of a disparate impact as a result of the transfer of the property, "a statistical showing of disparate impact on minorities, without more, fails to establish an equal protection violation." *State v. Clark*, 76 Wn. App. 150, 156, 883 P.2d 333 (1994); *see also Keyes v. School District No. 1*, 413 U.S. 189, 207-

08, 93 S. Ct. 2686 (1973) (requiring evidence of segregative impact and intentional state action to establish violation of federal Equal Protection Clause).

28. Clover Park does not allege any relevant intentional state action in this case, nor does the Record reflect racially segregative intent.

29. In the absence of evidence demonstrating discriminatory intent, there has been no demonstration of a violation of Article 1, section 12 of the Washington Constitution or the equal protection clause of the U S Constitution.

30. The transfer of territory does not offend Article 9, section 1 of the Washington State Constitution, which "imposes upon the state the paramount duty of making ample provision for the education of all resident children." *Seattle Sch. Dist. v State*, 90 Wn.2d 476, 482, 585 P 2d 71 (1978).

The APA

31 The Regional Committee and the State Board did not erroneously interpret or apply the law. RCW 34.05.570(3)(d).

32. The Record demonstrates that the administrative decisions at issue are supported by substantial evidence. RCW 34.05570(3)(e).

33. The Committee's decision and the State Board's subsequent ruling were reached through lawful procedures and are not inconsistent with precedent. RCW 3405.570(3)(c) and (h).

Appendix C

34. The decisions are not arbitrary and capricious. RCW 34.05.570(3)(i).

35. Neither the decision of the Regional Committee nor the Board's order violates the constitution on its face or as applied. RCW 34.05.570(3)(a).

36. The remaining provisions for judicial review under the APA do not apply. the administrative orders under review were within the statutory authority of the agencies, RCW 34.05.570(3)(b); the agencies decided all issues requiring resolution, RCW 34.05.570(3)(f); and Clover Park alleges no grounds for disqualification, nor was such a motion made, RCW 34.05.570(3)(g).

37. There is no basis under the APA upon which to reverse the Regional Committee's decision or the State Board's order.

38. Steilacoom is entitled to judgment as a matter of law.

ORDER

Accordingly, it is ORDERED that

Steilacoom's Motion for Summary Judgment with respect to Clover Park's claims is GRANTED. Clover Park's claims are DISMISSED.

DONE IN OPEN COURT this 4 day of Feb, 2005.

/s/
JUDGE SERGIO ARMIJO

Appendix C

Presented By:

PRESTON GATES & ELLIS LLP

/s/
Christopher L. Hirst, WSBA #06178
Laura K. Clinton, WSBA #29846
Carlos Chavez,
Attorneys for Interested Party
Steilacoom Historical School District No. 1

Approved as to Form;
Approved for Entry:

PERKINS COIE, LLP

By /s/
Michael W. Hoge, WSBA #6180
Attorneys for Petitioner
Clover Park School District

OFFICE OF THE ATTORNEY GENERAL

By /s/
David A. Stolier, WSBA #24071
Attorney for State Board of Education

OFFICE OF THE ATTORNEY GENERAL

By /s/
Anne Shaw, WSBA #12489
Attorney for Puget Sound Educational
Services District Regional Committee

APPENDIX D – ORDER GRANTING STEILACOOM'S MOTION TO QUASH PETITIONER'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION ENTERED FEBRUARY 2, 2005

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and, PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	No. 04-2-07167-0 and No. 04-2-10015-7 ORDER GRANTING STEILACOOM HISTORICAL SCHOOL DISTRICT'S MOTION TO QUASH PETITIONER'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION

THIS MATTER having come before the Court on the motion of Interested Party Steilacoom Historical School District No. 1 ("Steilacoom"), for protective order quashing

petitioner's first set of interrogatories and requests for production.

The Court having read and considered the moving papers, having heard and considered the arguments of counsel, having reviewed and considered the record and file herein, and being otherwise fully advised, now therefore,

IT IS HEREBY ORDERED that Steilacoom's motion for a protective order quashing petitioner's first set of interrogatories and requests for production is GRANTED. IT IS FURTHER ORDERED that any discovery to be conducted herein will only be expressly permitted by further order of this Court.

DONE IN OPEN COURT this 2nd day of February, 2005.

/s/
JUDGE SERGIO ARMIJO

Presented by:

PRESTON GATES & ELLIS LLP

/s/ Ramona M. Emerson, WSBA #20956
for Christopher L. Hirst, WSBA #06178
Laura K. Clinton, WSBA #29846
Carlos Chavez, WSBA #34076
Attorneys for Interested Party
Steilacoom Historical School District No. 1

Rec'd:
/s/ M. Hoge, WSBA 6180
/s/ Anne O. Shaw, #12489

APPENDIX E – ORDER LIMITING DISCOVERY AND QUASHING PETITIONER'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION ENTERED FEBRUARY 2, 2005

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and, PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	NO. 04-2-07167-0 and 04-2-10015-7 ORDER LIMITING DISCOVERY AND QUASHING PETITIONER'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

THIS MATTER having come before the Court on the motion of the Respondent, Puget Sound Education Service District's Regional Committee on School District

Organization, to limit discovery and to quash the Petitioner's pending Interrogatories, and the Court having read and considered the moving papers, having heard and considered the arguments of counsel, having reviewed the record and file herein, and being otherwise fully advised, now therefore,

IT IS HEREBY ORDERED that Respondent's motion to limit discovery and to quash Petitioner's pending Interrogatories be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that any discovery to be conducted herein will be only that as expressly permitted by further order of this Court.

DONE IN OPEN COURT this 2 day of February, 2005.

/s/
JUDGE SERGIO ARMIJO

Presented by:

ROB McKENNA
ATTORNEY GENERAL

/s/
Anne O. Shaw, WSBA #12489
Assistant Attorney General
Attorney for Puget Sound Educational
Service District Regional Committee

Copy received:

Appendix E

APPENDIX F – CLOVER PARK'S OPPOSITION TO MOTIONS TO QUASH DISCOVERY FILED JANUARY 20, 2005

THE HONORABLE SERGIO ARMIJO

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	No. 04-2-07167-0 and 04-2-10015-7 CLOVER PARK SCHOOL DISTRICT'S OPPOSITION TO MOTIONS TO QUASH DISCOVERY

In this case, a richer district, Steilacoom, attempts to take valuable tax-producing territory from a poorer district, Clover Park, that has roughly half minority students, roughly half poverty students, and over 40% students with parents in

the military, including many students whose parents have been killed or injured in Iraq.

Clover Park, the already-poorer district in this matter, has barely passed its last three maintenance and operations levies (two of the three failed on the first attempt), and has failed its last two bond issues (leaving it with no substantial source of funding for school construction and renovation and other pressing capital needs, because the State provides capital funding only for districts that have already passed bond issues).

If the richer district—acting as its largest private developer would wish so that property taxes are significantly lower, and new dwelling sales and commercial developments are correspondingly more numerous and quicker—succeeds, racial and socioeconomic separation will increase, and an already large disparity between the districts in per-pupil property-tax valuation will immediately grow significantly. And this is even before the much greater effects of future commercial and residential development in the large private development make the disparity much larger by a now-unknown, but obviously huge, factor.

Clover Park, the poorer district in this case, believes that Washington's constitution protects its students. Our Supreme Court has ruled that the constitutional interests of Clover Park's student may be represented by Clover Park's elected school board. *Seattle School District v. State*, 90 Wn.2d 476 (1978). Therefore, this is a case in which the economic interests of a large private developer are pitted against the educational interests of a substantially minority, substantially poor student population—one whose parents in many cases have experienced, and will continue to face, death or injury defending our Nation's interests (including the interests of large private developers).

Appendix F

It is not surprising that Steilacoom, doing the heavy lifting for the large private developer in this case, would continue to argue that our constitution has no application, or, grudgingly and alternatively, that if it does apply, its requirements are so undemanding as to have no application here. And it is not surprising that Steilacoom would urge an understanding of the applicable legal framework that would prevent Clover Park from developing and presenting its fundamental arguments, nor is it surprising the Steilacoom would resist Clover Park's discovery seeking to establish whether Steilacoom's legal bills are being footed by someone else.

It is more disappointing that the Regional Committee and the State Board join to seek to block Clover Park's development of its legal theories.

Steilacoom, the Regional Committee, and the State Board all take the position that this case, being an APA case, must be reviewed on the record only, or that, because it is solely an APA case, Clover Park must have court permission to initiate discovery.

All three parties ignore that which they have seen, been reminded of, and responded to in answering Clover Park's petition and complaint: Clover Park's case invokes not only the statutory review process of RCW Ch. 28A.315, but also the Superior Court's inherent jurisdiction under our constitution. Amended Appeal, p. 8, ll. 29-37; Hoge Declaration.

Under the stated theories of Steilacoom, the Regional Committee, and the State Board, there would never be an opportunity for Clover Park to develop its allegation that the Regional Committee violated the Open Meetings Law in reaching its March 25, 2004 decision that is appealed from here. Clover Park's opponents say that such concerns should

have been stated earlier (which they were), and developed earlier (which was impossible), and that because APA cases are reviewable only on the record except in narrow circumstances, Clover Park cannot pursue its claim.

The review mechanisms of RCW Ch. 28A.315 are a strange beast indeed. Ordinarily, of course, court review of cases under the APA consists of reviewing a record that was developed according to common rules of procedure and evidence. Here, there is an APA-type review of the State Board's decision. But the State Board's review was not one in which evidence was presented according to the normal agency hearing process under the APA. Rather, the State Board was itself reviewing a record compiled according to few or no rules of evidence or procedure. There is no evidence in the record that is sworn, or has been subject to cross-examination, or has been subject to the most elementary rules of admissibility. Clover Park's claim that constitutional due process requires more before the most fundamental, paramount interests of its students are infringed is thus a most ordinary claim under the circumstances—one which could not be vindicated at all through the legal process if the Court's consideration is limited to a record compiled as was the Regional Committee's.

Sadly, the Regional Committee argues that its decisions are impenetrable because the inner workings of the Regional Committee's decisionmaking process are inviolate under normal administrative law principles. But of course the Regional Committee's decisions are for the most part not quasi-judicial (even though the State Board's are—and that is why Clover Park's carefully targeted, modest initial discovery did not ask the same sorts of questions to the State Board). The Regional Committee cites to authority shielding the inner workings of administrative agencies operating under the APA. But the Regional Committee does not operate under the APA.

Appendix F

A rule such as the Regional Committee urges would give the Regional Committee, which has always acknowledged that it is bound by the Open Mcetings Law, free license to violate the Open Meetings Law without scrutiny or consequence. If no discovery regarding intra-Committee communications outside the open meeting venue is permitted, then of course it would never be possible to uncover discussion and decisionmaking inconsistent with the Open Meetings Law's requirements. Here, concerns for Open Mectings compliance could not be developed before the Regional Committee, and they could not be developed before the State Board. They can only be developed before a court of general jurisdiction, such as this Court, that has inherent authority under our constitution to consider this and Clover Park's other constitutional, statutory, and common law claims. Clover Park's assertion of the Court's general jurisdiction entitles Clover Park to pursue discovery without special advance Court permission.

The Regional Committee appears to take umbrage at the "implicit" assertion in Clover Park's discovery that the whole record before the Regional Committee was not forwarded to the State Board. Yet it is clear and certain from the record itself that the full record was not forwarded. *See*, e.g., R-919, ll. 2-11 (counsel's reference at the March 3, 2004 hearing to distributed legislative history materials regarding the law under which this proceeding occurs), and note the absence in the record of those materials. These materials are instructive in many ways—for instance, in making clear that Steilacoom's theme and slogan before the Regional Committee, "One Great City, One Great School District," R. 467, no longer has any basis or support in the law, even though encompassing cities within one school district was an important concept for nearly a century before the 1999 revisions to the school district reorganization law. *See* accompanying Hoge Declaration. The materials also make clear that negotiations between school districts are an

essential part of the legislative scheme—which is inconsistent with Steilacoom's position that good-faith negotiations are not required. And, in light of the State Board's decision that the negotiations process is not within the Regional Committee's or its own scope of review, again only the Court can vindicate the legislative policy. The materials should have been included in the record, and their absence creates legitimate reason to inquire into similar omissions.

The Regional Committee's interest in avoiding discovery may stem in part from its understandable sensitivity regarding its common practice of holding dinner meetings in advance of its scheduled public meetings, and regarding extra-hearing communications among the Regional Committee members. Moreover, email traffic or other communication among Committee members, for instance—even round-robin email traffic—concerning matters before the Committee for decision can violate Clover Park's right to have the Committee's full deliberations conducted in open, public, announced meetings. *Wood v. Battle Ground School District*, 107 Wn. App. 550 (Div. II 2001). The Regional Committee is stalling Clover Park's pending Public Records requests for information about the Regional Committee's dinner meetings in advance of some or all of the November 5 and 25, 2003 and March 3, 2004 meetings in this matter. *See* accompanying Hoge Declaration. There remains no explanation in the record for the difference between the Committee's November 25, 2003 action and its final written decision of March 25, 2004.

Steilacoom argues that there is no place in this proceeding for discovery regarding the motivations of Steilacoom, the Regional Committee, and State Board in initiating their actions and making their decisions. Yet Steilacoom also argues that establishing unconstitutional racial discrimination requires proof of purposeful

discrimination, *see* Steilacoom's pending Motion for Summary Judgment, pp. 32-35. A nice position if one can get away with it, but internally inconsistent: If one insists that effects, without more, cannot make out a violation, then it follows that discovery into purpose is essential to full airing of the important issues at stake. Otherwise, since constitutional violators rarely if ever openly admit their improper motivations, the most egregious constitutional violation would have no judicial remedy.

Clover Park continues to assert, as it did before the Regional Committee (to absolutely no reaction) and to the State Board (which at least acknowledged that it would not address the matter, leaving it to the courts) that under the Washington Constitution, proof of purposeful discrimination is not necessary to make out a constitutional violation. But until Steilacoom, the Regional Committee, and the State Board agree on the record with that position, Clover Park is entitled to develop the theories that its opponents, or any of them, argue are controlling.

"He who pays the piper calls the tune." If Steilacoom's litigation is funded in whole or part by another person, entity, or entities, then full examination into the motivations of the relevant actors in this matter would be impossible without awareness of that situation.

Clover Park's modest initial discovery—served with the legitimate assumption of timely responses within the rules sufficient to take followup depositions within the case calendar's schedule—in all cases seeks only information relevant to its proper claims. Clover Park's Open Meetings and constitutional claims, which invoke the Court's inherent jurisdiction and are not based solely on its claims of unlawful action under the APA, are made in good faith and can only be developed through normal discovery. Steilacoom, the Regional Committee, and the State Board's position would

leave Open Meetings violations without remedy, and would leave constitutional violations without remedy.

Even if the Regional Committee failed to consider constitutional values, and even if the State Board explicitly declined to do so, it is the Court's duty to do so. And the Court's consideration can only properly be given following normal development of the background facts. Clover Park respectfully urges that the pending motions to quash discovery should be denied in their entirely.[1]

DATED this 20th day of January, 2005.

PERKINS COIE LLP

By /s/
Michael W. Hoge, WSBA #6180
Attorneys for Clover Park School District

---

[1] Clover Park references and incorporates herein the following portions of the State Board's transmitted record, but does not repeat here most of the points made below: R 307-11; 155-91; 95-104; 91-94; 8-24 and 80-83.

APPENDIX G – HOGE DECLARATION IN SUPPORT OF CLOVER PARK'S OPPOSITION TO MOTIONS TO QUASH DISCOVERY FILED JANUARY 20, 2005

HONORABLE SERGIO ARMIJO

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	No. 04-2-07167-0 and 04-2-10015-7 DECLARATION OF MICHAEL W. HOGE IN SUPPORT OF CLOVER PARK SCHOOL DISTRICT'S OPPOSITION TO MOTIONS TO QUASH DISCOVERY

Appendix G

I, Michael W. Hoge, hereby declare as follows:

1. I am the counsel of record for Clover Park School District in this matter, and as such have personal knowledge of the facts stated herein.

2. The facts stated in the accompanying Clover Park School District's Opposition to Motions to Quash Discovery are true to the best of my knowledge. They and the exhibits attached hereto are incorporated herein.

3. Steilacoom, the State Board and the Regional Committee initially took the position in this matter that they did not have to file answers because that is not required under APA proceedings. They filed answers after I reminded them that Clover Park's claims were not only under the APA, but also pursuant to the Court's inherent jurisdiction, and indicated that Clover Park would file motions for default if no answers were filed. Attached as Exhibit A is a true copy of email communication among the parties regarding these matters.

4. On December 28, 2004, Clover Park Deputy Superintendent Al Cohen made Public Records Law requests for certain information from each of the parties, true copies of which are attached hereto as Exhibits B, C, and D. Steilacoom has not furnished any responsive records. The State Board has furnished some responsive records, but more are pending. The Regional Committee has furnished some records, but withheld others for reasons that appear questionable but may well relate to concern for Open Meetings vulnerability. In the spring of 2004 I examined the Regional Committee's public file in this matter, and noted the presence of several email messages indicating the Regional Committee had dinner meetings in advance of each of its November 5 and November 25, 2003 and March 3, 2004 meetings. Although the Regional Committee initially

responded to Dr. Cohen's December 28 request by letter, Exhibit E, indicating the requested records were available for inspection, no records of the Clover Park-Steilacoom matter were made available when I, as Dr. Cohen's designee, went to the Regional Committee's offices on January 13 to inspect the records. I was told I would need to return on January 18 to see them. Upon my return January 18, I was given a letter stating that important portions of the records would now be delayed until January 31 (i.e., after the hearing on the Regional Committee's motion to quash). A true copy of that letter is attached hereto as Exhibit F. Examples of evidence of the Regional Committee's common practice of having dinner meetings in advance of its open public meetings are attached hereto as Exhibits G-J.

5. Among the items of legislative history presented by the Regional Committee's counsel to the Committee on March 3, 2004, but not included in the record, is the attached Exhibit K. This document shows the legislature, when it passed the school reorganization law in 1999, understood that having single school districts within a city would no longer be a factor for consideration (contrary to Steilacoom's highlighted theme to the Regional Committee), and that the overall scheme of the statute depended importantly on negotiations between districts involved in territory transfer matters (contrary to Steilacoom's position that good-faith negotiations are not a requirement, and notable given the State Board's assertion in its decision that the conduct of negotiations is beyond its, or the Regional Committee's, reach—once again leaving vindication of legislative policy to this Court alone).

Appendix G

I declare under penalty of perjury of the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 20th day of January, 2005.

/s/
Michael W. Hoge

[Exhibits Not Included]

APPENDIX H – ORDER CONSOLIDATING CASES AND DENYING MOTION TO VACATE ORDER GRANTING STEILACOOM'S MOTION OF PREJUDICE ENTERED AUGUST 27, 2004

HONORABLE SERGIO ARMIJO

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	NO. 04-2-07167-0 and NO. 04-2-10015-7 ORDER CONSOLIDATING CASES AND DENYING MOTION TO VACATE ORDER GRANTING STEILACOOM'S MOTION OF PREJUDICE

Appendix H

Petitioner/Plaintiff Clover Park School District's (Clover Park's) Motion to Consolidate Cases was brought on for hearing on August 27, 2004, having been properly noted and served upon each of the parties. Based upon the Motion and its supporting materials, the related material in the record, and the nonopposition of any other parties, the Motion is GRANTED. Henceforth, both cause numbers captioned above shall be heard together before Department 9.

Clover Park's Motion to Vacate the Court's August 3, 2004 Order granting Steilacoom Historical School District's (Steilacoom's) Motion of Prejudice was also brought on for hearing on August 27, 2004, having been properly noted and served upon each of the parties. Based upon the Motion and its related supporting materials, and upon the submissions of Steilacoom and the argument of counsel, the Motion is DENIED.

DATED this 27th day of August, 2004.

/s/
Judge

Presented By:

PERKINS COIE LLP

/s/
Michael W. Hoge, WSBA #6180
Attorneys for Clover Park School District

Copy Received; Notice Of Presentation Waived:

OFFICE OF THE ATTORNEY GENERAL

Not present
Anne Shaw, WSBA #12489
Attorney for Puget Sound Educational
Services District Regional Committee

Appendix H

OFFICE OF THE ATTORNEY GENERAL

/s/

David A. Stolier, WSBA #24071
Attorney for State Board of Education

PRESTON GATES & ELLIS LLP

/s/

Fredric C. Tausend, WSBA #3148
Attorneys for Steilacoom Historical
School District No. 1

APPENDIX I – VERBATIM REPORT OF AUGUST 27, 2004 PROCEEDING

IN THE SUPERIOR IN AND FOR THE COUNTY OF PIERCE
STATE OF WASHINGTON

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Plaintiff, vs. WASHINGTON STATE BOARD OF EDUCATION, Respondent, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Respondent.	No. 04-2-07167-0 04-2-10015-7 COA No. 32953-1-II

VERBATIM REPORT OF PROCEEDINGS

Appendix I

BE IT REMEMBERED that on the 27th day of August, 2004, the above-mentioned cause came on duly for hearing before the HONORABLE SERGIO ARMIJO, Superior Court Judge in and for the County of Pierce, State of Washington; the following proceedings were had, to-wit:

Reported by,
Carla J. Higgins

PUBLISHERS NOTE

PAGES 52a-55a ARE MISSING IN ORIGINAL DOCUMENT

Appendix I

MOTION

AUGUST 27, 2004

THE COURT: Go ahead and read the caption into the record, please, the moving party.

MR. HOGE: It's Clover Park School District versus Washington State Board of Education, Puget Sound Educational Service District and Steilacoom Historical School District, Cause No. 04-2-07167-0.

THE COURT: Your name, sir?

MR. HOGE: I'm Mike Hoge, from Perkins Coie, representing Clover Park.

THE COURT: Sir?

MR. TAUSEND: I'm Fred Tausend from Preston, Gates & Ellis representing Steilacoom Historic District No. 1.

MR. STOLIER: David Stolier, Assistant Attorney General, representing the State Board of Education.

MR. HOGE: Your Honor, Anne Shaw of the Attorney General's Office represents the Puget Sound Educational Service District. It's my understanding from her that she does not oppose today's motion to consolidate and takes no position on the matter of the motion of prejudice and I don't think she plans to be here on that account.

THE COURT: Let's start with the motion on prejudice. My first thought from reading this last night is should this not be before the judge that accepted the Affidavit of Prejudice?

MR. HOGE: Well, Your Honor, may it please the Court, Mike Hoge on behalf of Clover Park. That was my initial inclination, too. Mr. Tausend and I have discussed that. It is common in all other context, all other context that I'm aware of, for the judge against whom an affidavit is filed to hear the matter of whether she's prejudiced or not.

The one consideration I think that may be a factor here, and we can't know because Judge Grant gave no reason, is that under the canons of judicial ethics, if the Court itself has the impression that an appearance of impropriety might be created by hearing a matter involving her nonpartiality, that she may opt out of consideration of that matter. And I am, I am, you know, just assuming that maybe that's the reason we're before you. I don't know. But I would agree with the Court that absent that factor it would be appropriate for Judge Grant to hear the matter.

MR. TAUSEND: Let me tell you why I think it would not. The motion for prejudice is an absolute motion subject possibly-- arguably to the issue that's raised by counsel. But under the rules and the statute for the motion for prejudice, once a judge has ruled in this discretionary manner, the Affidavit of Prejudice cannot be made. And for Judge Grant to rule on this motion would plainly be a discretionary matter. And that's why it seems to us it's imperative and mandatory that it be before some other judge.

As I understand the way the motion works, you just file the Affidavit of Prejudice and it is automatically transferred to another judge. At that point if you want to challenge that Affidavit of Prejudice on the grounds that counsel has challenged it on, the other judge would determine that. And if you were to rule that this was an impermissible, unconstitutional Affidavit of Prejudice, then I assume it would go back to Judge Grant.

THE COURT: What's your position, sir?

MR. STOLIER: Your Honor, I don't really have anything to add to the two sides to the right and left of me. We don't really have a position on whether the judge should be disqualified or not.

MR. HOGE: Your Honor, if I may, I would like to point out that I think Mr. Tausend's reason for Judge Grant not hearing it is not particularly well-taken because once she makes the decision, whichever way it goes, it doesn't matter any longer if she is disabled from hearing the case. If she were to rule that our motion to vacate is proper, yes, that would have been a discretionary ruling but the effect of that would be that she would be hearing the case. And it wouldn't matter after that if she went on to make successive rulings.

On other words, if she heard the matter and decided that the Motion of Prejudice should stand, although that's a discretionary ruling, the effect of it would be to transfer the case to Your Honor or some other judge. So I don't see how her hearing it would affect the validity or the permanence of whatever decision she makes.

THE COURT: Well, like many other motions that are brought in for reconsideration, we normally say take it back to the judge that heard the matter the first time. Here we have a situation where the affidavit has been filed and the judge signed off on it saying, okay, I'm out. And she said now you decide whether it's constitutional, permissible the way this was done or the reasons this was done. It's somewhat unusual.

MR. TAUSEND: I might say, Your Honor, to my knowledge this type of challenge in the state of Washington, at least, and in most other states, is not only unusual, it's unprecedented. There's no precedent for it.

This isn't a Motion for Reconsideration. It's a motion following a Motion for Prejudice to vacate a motion on constitutional grounds. It couldn't have been made until the Affidavit of Prejudice was filed and the order entered and therefore is very different.

As I said, we want to be super careful. I think that any way this matter goes, it's going to be reviewed and therefore we want to take no chances and protect our record. And even though tautologically-- I think that's the right word-- Mr. Hoge's argument follows, the fact of the matter is that a court reviewing it could say, well, there was a discretionary order and therefore her vacation or refusal to was invalid. I just think it's safer and better to have another judge.

It was transferred to Your Honor. I assume you got it automatically or by some administrative decision when the vacation order was signed.

THE COURT: Okay. Well, I did read the material. I'll just go ahead and hear it. As counsel says, if there's a disagreement, you can still take it up to somebody else.

MR. HOGE: May I mention before getting started on this one, Your Honor, to guard against the possibility, otherwise I'm going to forget the second motion, we had pending also a Motion to Consolidate a couple of cases and I think all parties have agreed that this is appropriate for granting an entry.

THE COURT: That's my understanding. It's going to be consolidated. I understand that.

MR. TAUSEND: That's correct.

THE COURT: I'll sign the order, if you have the original. I'll try to find it. I think I saw it in here some place.

MR. HOGE: I have a proposed order dealing with both matters.

THE COURT: Go ahead, counsel, with the--

MR. HOGE: Thank you, Your Honor.

As our materials set forth, this is a case involving a richer district, Steilacoom, attempting to take high value territory from a poorer district, Clover Park. The effect of that would be to make both emino (phonetic) levies and bond issues, which are already difficult to pass in Clover Park, more difficult. Clover Park has just squeaked by its last several maintenance and operations levy attempts. It has failed its most recent bond attempt. And the record in this case shows the effect of the transfer would be to separate, rather than to bring together, students on racial and socio-economic bases.

When Clover Park first seriously raised these issues before the regional committee, Steilacoom ridiculed them in rather scornful terms and has continued to do so. When Judge Grant drew the case, was initially assigned this case, Steilacoom's response has been to file an affidavit saying she's prejudiced against Steilacoom's lawyer and the Steilacoom School District, but giving no reasons for why they believe that to be the case. And, in deed, in most situations peremptory removal of a judge, as we all know, takes nothing more than that.

Clover Park-- by the way Steilacoom, in filing that Motion of Prejudice, noted it for ten days out. They filed it on August 3rd and noted it for August 13th. It appears that Judge Grant signed the proposed order the same day it was

received and thus Clover Park never had the opportunity to oppose the motion, even though it had been set for ten days out.

Clover Park filed an opposition immediately. I think the order was entered on a Tuesday or Wednesday. Clover Park's initial statement showing opposition was filed later that same week. And then the following week Clover Park, upon learning that Judge Grant had indeed signed the proposed order without a hearing, we filed our Motion to Vacate the order. And it was originally set for last week but we decided to put it over until this week.

Steilacoom has opposed Clover Park's Motion to Vacate the order, which we made on the grounds of the Batson principal, that under the state constitutional counterparts of the US Equal Protection clause, a party cannot peremptorily affidavit a judge for reasons that may include racial reasons, any more validly than a party can peremptorily remove a juror for reasons that include race. And that's a-- that's a pretty straight-forward principle. All of the cases in the Batson line of cases and over the last nearly 15 years, there have been many, many such cases, usually applied in the criminal context as we all know, but at least one, which Mr. Tausend brought to our attention, in the civil context. I'll say it's not just the rights of the litigants that are at stake here-- and Clover park is representing a student body that's about half minority, much more minority than Steilacoom-- it is also the rights of the persons affected by the motion and the rights of the community as a whole in justice, equally administered, without regard to race.

Steilacoom has taken as its initial position that that Batson line of analysis, which after all is just a very straight-forward application of equal protection type principles that apply in virtually every type of context where race is an issue in litigation, has no application whatsoever to

a civil case like this one. And I suppose the natural consequence of that position, if it were true-- if it were accurate, is that a party could affidavit summarily a judge for the openly stated reason of pure racial prejudice and there would be nothing anybody could do about it.

Of course, things are rarely that simple when it comes to actions taken in part for reasons of racial motivation. Usually if there is a racial motivation to an action in a legal matter, it is made for other stated reasons. And the task of the courts becomes to smoke out whether the rational, the nonracial reason offered for a particular action, is in fact the true reason or whether instead race appears to have played a part.

If race has played a part or if the allegation that it has played a part is not rebutted effectively, in spite of opportunities to do so, then the party against whom the allegation of race conscience action is made, still can justify its action by acknowledging that, yes, race played a role but it was an insignificant role; we would have made the same decision with or without consideration of race. And if they make that argument successfully, that is ordinarily enough to carry the day and in this context, that type of argument, it seems to me, probably would have had a little more surface plausibility than the out-right denial that race had anything to do with Steilacoom's Affidavit of Prejudice.

We don't contest that Steilacoom may have had other reasons in mind, or at least has other reasons in mind now, since Clover Park has raised this question. But the question under the constitution is whether race was among the motivating factors. And, if so, would the same decision have been made without consideration of that factor.

Well, here in the process of trying to smoke out what the true motivation was, Steilacoom has asserted

flatly that race played no role in its decision to affidavit Judge Grant but the affidavits or declarations that Steilacoom has filed don't state that. They do give reasons that could have easily been manufactured after Clover Park filed its Motion to Vacate. They say that Judge Grant used to sue school districts when she was a private attorney. On that ground, of course, no prosecutor or public defender could ever become a judge and hear criminal cases. They refine that argument a little bit after it was pointed out that both main parties in this case were school districts and thus prejudices by the judge against school districts didn't cut either way. They have since asserted it's because this case involves allegations by Clover Park of-- and mistakes against Steilacoom that they have not-- that they have filed the Affidavit of Prejudice against Judge Grant.

We have cited cases to the effect that no matter what the subject matter of the case, that's not the proper inquiry on matters of prejudice. It's whether the judge is prejudiced against the party or the lawyer. And all we have is Mr.-- one of the Steilacoom lawyer's bare assertion that he believes Judge Grant is prejudice against him. No proof that at the time the declaration was filed or the Affidavit of Prejudice was filed, race played no factor, even though that was clearly in play at the time these responsive materials were filed.

So on the basis of the full record before the Court now, it appears we have a situation where an inference has been created and supported and, in fact, through the evasions and changes of Steilacoom, more firmly supported that race did play a part at the time the decision was made. It hasn't been denied. There's been no attempt to list their motivations, the actual motivations as of the time the declaration was filed as opposed to a post hoc justification. And therefore we assert that the Court has more than enough evidence under the law to vacate the Motion of Prejudice.

Thank you.

THE COURT: Mr. Tausend.

MR. TAUSEND: First of all, Your Honor, counsel has made a point in his papers that we don't accept, which is that nobody on behalf of Steilacoom has, under oath denied, under penalty of perjury, that race was the sentence that race was not in any way a motivation. And we give, in both Mr. Hirst's and Mr. Himmler's-- the school superintendent of Steilacoom Historic School District-- reasons that were the reason for exercising the affidavit, which are inconsistent with and at least implicit representations of race. But to be absolutely certain that it is clear that race had nothing, nothing to do with this, we have a second declaration of Mr. Himmler that has been signed and I would like to file at this time. I have copies for counsel. I haven't conformed it but it was signed today by Mr. Himmler, who's present in court.

On the merits: Our position is that this motion is without any validity or strength for four consecutive reasons and we address them all.

First of all, the statute, 4.12.040 and 050, as Your Honor certainly knows, gives an absolute right in its terms to file an Affidavit of Prejudice, remove a judge for no reason, no stated reason, provided it's timely. Any party has a right to remove one-- you only get one--superior court judge, subject only to timely filing. So we start with a statutory right that is consistently enforced and upheld in this state. And at the time you file an Affidavit of Prejudice, you don't have to either give or think of, but you certainly don't have to give or state a reason for doing it. It's an absolute right.

Secondly, as I indicated earlier, there is no authority in this state that the statutory affidavit is subject to

the same analysis as the Batson analysis, which we're all familiar with, either federal or state cases. There's no federal right to remove a federal judge anyway like there is an affidavit in state court. But there's no authority at this point for supporting Mr. Hoge's argument.

Secondly, the Batson analysis, which is a multi-faceted analysis, simply doesn't apply to the question of striking a single judge. A lot of the reasons are set forth in a state case cited at page three of our brief, it's State vs. Rhodes, as to why relevant circumstances apply to peremptory challenges, it's unusually more than one, against jurors. And I'm not going to go through them. They are on page three and Your Honor can refresh your recollection by looking at it there. But you're dealing with a group that has to be heterogeneous by the community as a whole. Certainly diversity on the bench is desirable. It is something our society must strive for. But that in itself does not mean that an Affidavit of Prejudice filed will be suspect just because it has been filed by a person of color, against a white judge or a person not of color, against a judge of color. Once that is done at any time, if that's the presumption, we not only make serious concerns about our system of equal justice, we run the risk of implying racism when none exists. And when you only have a single strike or a single judge, that doesn't apply and cannot apply. So there's a right, there's no authority to support their position.

People v. Superior Court case, which is a California case, that we call to counsel's attention and the Court's attention, does address this question and does raise interesting points that lead to the third and fourth points. It's not law in this state but in a sense it says the Batson analysis doesn't apply. It's certainly not self evident. But it also says that you can't strike a judge for racial reasons. And then it gives-- In that case, the Court of Appeals did overturn a decision that held that the judge had been stricken for racial

reasons. And the analysis the court applied said Batson may not apply, equal protection does apply.

As counsel has said and suggested, and we don't disagree with this, a party or a counsel who exercised a peremptory challenge for openly and basically stated racial reasons, that peremptory challenge ought to fall.

THE COURT: That's what the prosecutor said in that case, gave the reason for racially removing that judge.

MR. TAUSEND: In People?

THE COURT: Right.

MR. TAUSEND: What the prosecutor did in that case is they had challenged three jurors, or a number of jurors, in the jury case which was held to be a challenge on racial grounds and that had resulted in the mistrial. And then the matter came back before the judge and an affidavit was taken against the judge. So you had a history of the prosecutor having racial challenges. And even in that instance, the Court of Appeals said, no, that's not enough to establish a prima facie case of racism.

THE COURT: That is not to say that you basically have the same case all over again. You've had a mistrial so it goes back to the same judge and you cannot use an affidavit. That's not the analysis. It's more of the statements used on the jurors.

MR. TAUSEND: What the court said there-- and that's what-- if Your Honor takes the next step and says, okay, if there is a question raised here, then I have to consider it as to whether this was racially-- a challenge for reasons of race. Then under Batson, there is a formal sequence that your analysis has to do. And the first question

you have to raise is has Clover Park met its prima facie burden of showing that Steilacoom's challenge to Judge Grant, filing of its motion for prejudice, was racially motivated, for racial reasons.

The prima facie case, the Court of Appeals said in People vs. Superior Court in California, was never met. It never shifted the burden. The court said even though the challenger to the affidavit shows that the same prosecutor had also challenged a number of jurors of color, that was not enough to show an improper motivation or that the challenge to the judge was motivated by race.

So let's look at what we have here. Steilacoom filed its motion for prejudice as it's entitled to do under the statute without stating any reason. Clover Park raises an opposition to that on grounds of equal protection. What is its evidence that Steilacoom filed its motion for reasons of prejudice? One is they have alleged, Clover Park has alleged, that a racial question is involved in the underlying case; namely, the racial imbalance that can occur. This is their claim. We don't agree there's any evidence to support that, that there's a racial issue in the transfer of property from one school district to another.

We submit actually, Your Honor, that there was no evidence in the record to support that. But that's not really the issue here. The issue is they claim there is a claim affecting race in the underlying case.

And, secondly, that the judge against whom the affidavit was filed is African American. No more than that. In their papers, they say two other things and counsel did in his argument today, one is that when the racial imbalance argument was raised below, counsel for Steilacoom called it bologna. He dismissed the argument as having any validity. To suggest that attacking a charge of

racial imbalance or a claim of racial imbalance as not supported by the record is racist, is astounding. Lawyers-- he didn't use any racially derogatory terms to characterize that argument. He used slang. He said it's bologna.

If you look at it, what he's saying is there's nothing in the record to support it. Does that establish racism? I don't think so. And the second point he makes is that on appeal before the Board of Education, in conclusion, in summary, the argument made by Clover Park is characterized as being made with bravado, that means without any basis in the record. As I don't need to tell Your Honor, or anybody in this courtroom, lawyers will frequently characterize their opponent's arguments in unflattering terms. Not racist terms, not racially suggestive or code word terms. There's no code word, code meaning in bologna. And there's no code meaning that I know of in bravado. So those two go.

So all we have here is the fact that with or without support in the record, and that's debatable, an issue of racial imbalance is injected into this and the judge who was challenged is of African American heritage.

The same would apply once racial imbalance was injected into the record if the judge was of a Norwegian heritage and the challenge was made by somebody who was not white. Simply to have that bare factual record does not meet the prima facie case. And to me that's where this motion should end and be decided.

But we do take the next step and we put in a statement of the nondiscriminatory reason, the nonracial reason for taking the Affidavit of Prejudice, which was in fact the reason. And that is that Judge Grant-- in her practice, and it's advertised in Martindale and Hubbell, as being a lawyer for claimants against, among others, school districts--

handled cases against school districts on behalf of plaintiffs who allege discriminatory treatment, failure to deal fairly. All those elements of claims that are made by a claimant employee against an employer. A perfectly important and good practice.

And the fact, as counsel says, that a former prosecutor then couldn't serve fairly as a judge, is a red herring in this. Nobody is saying that or that Judge Grant can't serve fairly in a case involving school districts. What we are saying is that, just as we might take an Affidavit of Prejudice against a former prosecutor who's a judge in a case where we felt that judge, because of his history as a prosecutor, wouldn't give us a fair trial. One shot. We may end up with another prosecutor. We may end up with another judge of color in this case. That's not the point. The point is, is this a valid rational nonracist reason? If we even meet that question, because as I told you, I thought they don't even get past step three, which is the burden of proof, but under People-- if it does apply-- vs. Superior Court and under a fair understanding of the equal protection clause and the principles of Batson, even if they were to apply, the statement of a nonracist reason ends the decision, even if you get that far.

Going into the actual subjective process of thinking at and when it occurred, to motivation at the time the Affidavit of Prejudice was taken, is highly dangerous. When a reason is stated, as it is here, that is nonracist and we spell it out specifically, one is that she had a practice of bringing claims against school districts and suing school districts, and two is in this case there is an allegation of malfeasance, namely failure to negotiate in good faith, that could be important in the underlying case. Those are nonracist reasons. And at this point I think if we had gotten that far, that ends the challenge.

THE COURT: Anything you want to add, sir?

MR. STOLIER: No, Your Honor.

THE COURT: Response?

MR. HOGE: Yes, Your Honor. I understand Mr. Tausend's point that a prima facie case needs to be made out before other steps of the inquiry are proceeded with. I understand why he would want the test for whether a prima facie case has been made to be a very difficult and burdensome one to meet. But the fact is in most legal analyses, a prima facie case is simply a matter of putting together two or three facts that suggest an outcome. Facts from which an inference can be drawn that a particular motive was a factor in action. And then the inquiry proceeds on to try to smoke out what the real reasons were. Whether the reasons offered are protectoral or made up after the fact; whether, even if, for instance here, a racial reason could have been a part of the decision, it nevertheless was not a controlling or decisive one and therefore if it was a factor, it can pass properly. But to suggest that the burden of the Clover Park Schools, in this situation, where we suggest the obvious possibility of racial motivation, I certainly was not one bit surprised when Steilacoom filed this motion. And I thought at the time I knew the reason why.

You know, if there has to be overt evidence of racial discrimination displayed on the face of the record before a prima facie case is made out, it will be relatively easy for persons who are, in fact, affidaviting judges for racial reasons to do so with no effective scrutiny.

So I think the more traditional and common way of looking at these things makes sense. And after all, if I read the California case correctly, People, the court did go on to consider all of the evidence because it had been laid

before it and it made a decision on the basis of the whole evidence, saying it would be proper-- improper to do otherwise. So here we have a developing body of evidence that was supplemented just a few minutes ago by the declaration Dean Tousend offered to the Court and counsel just then. I'm sorry, given that it responds to something we provided to Steilacoom on Tuesday, I didn't see it before I got before the Court. But I would like to point out that in some important ways it still seems to evade the issue. It wasn't the superintendent who gives us this declaration, who filed the Affidavit of Prejudice against Judge Grant, it was Steilacoom's lawyer.

Steilacoom's lawyer has given us nothing under oath regarding whether race was a factor in that decision. The superintendent, who earlier said the reason for filing the affidavit against Judge Grant was because she made claims of malfeasance and mistakes against school districts is now back to saying that the reason was, is she had a practice emphasis on litigation against school districts.

As we know from the record, Steilacoom itself failed to file an Affidavit of Prejudice against Judge Grant on another case they had before her. And looking at the LINX site of the court, it appears there have been no other Pierce County School District cases that has seen the need to file an affidavit against Judge Grant, even though there are cases, school district cases, she has had here.

Again, now, the superintendent says he has personal knowledge of the reason, and race was not a factor. We're still left in the dark as to when the superintendent developed that personal knowledge, whether it's something he's relying on from another source, whether he was even involved in filing the Affidavit of Prejudice. So the key person who could testify conspicuously continues to fail to do so. All it would take to counter, effectively, all of the

other evidence before us is a declaration from Steilacoom's lawyer saying at the time I filed this, race was not a factor in my mind. Now, whether that would be plausible or believable enough would be a function of whether the other evidence before Your Honor overcomes it. But right now we don't even have that kind of an assertion against which to evaluate all of the rebuttal evidence.

Our position is that this latest bob and weave is insufficient to overcome the weight of the evidence and that the Motion to Vacate should be granted.

THE COURT: The Court notes that the briefs, one of the briefs provided the Court was the Oregon statute, which allows the judge to set a hearing to determine-- to accept the Affidavit of Prejudice or not. That is not within our statutes in Washington. I say that because in many years of experience sitting on the bench, Tacoma Municipal Court and here, sometimes we take it personal when they affidavit us, one case after another-- it's not like you don't have work. So people do affidavit you. And do you question them? Can you stop them and say, well, what's going on here? What's your problem? We don't do that. We just shrug our shoulders and say, "next".

So as I understand it, it's a matter of right, that no reason need to be given as to why the Affidavit of Prejudice is filed.

To use the Batson analysis to this type of a situation, equal protection argument and all of that, that would be brand new to this state, at least to the authorities that have been cited to me. I have not seen that analysis.

There is a concern that it could, but I don't know if it's racially motivated and I'm not going to get involved in that. I'll just go back to my understanding of the

statute which allows the Affidavit of Prejudice to be filed without any reason.

Thank you.

MR. HOGE: Your Honor, I think that means that you have the honor of hearing this case and there is a calendar matter I discussed with Dean Tausend that we would like to bring before you just briefly, if we could.

Because this case was originally filed in April, we got a case schedule that called for Confirmation of Joinder to be filed last week. We were unable to say that matters had been joined, et cetera, so that puts us in the category of having a status conference due the week of September 15th. I think we're in agreement with the concept that it makes sense to this case, since we don't even have answers yet, to bump that whole schedule by two, three months and maybe with your permission we could huddle in and agree on a calendar to present to Your Honor along those lines.

MR. TAUSEND: I have only one administrative question and that's because even though I did a lot of practice in Pierce County some years ago, I'm not here regularly, as you know, now. In a Motion to Consolidate--and either judge would be acceptable to us. I think I know who-

THE COURT: Judge Fleming?

MR. TAUSEND: Is that it? How does-- Where does it go?

THE COURT: What does the order indicate, the way you drafted it?

MR. HOGE: The way it's drafted, it would reside here. The motion was to consolidate the case before Judge Grant, you got that case. The case was before her and you got that motion so the way it reads now, the cases would be consolidated before Your Honor.

THE COURT: You've used up your affidavit, counsel.

MR. TAUSEND: I don't choose to-- I wouldn't take one in any event. I just wanted to know how administratively-

THE COURT: We'll keep it here.

MR. TAUSEND: And you are Department--

THE COURT: Nine.

MR. HOGE: I have a proposed order. It would take a slight change at the end to reflect that our Motion to Vacate was denied. I can either make those changes, give it to Your Honor to make the changes or present-

MR. TAUSEND: Here's what I would suggest. Does Judge Armijo have-- have him do it or doesn't matter.

THE COURT: You can work on that. Do me a favor, step back and work on it. If you want to use the jury room, we don't have a jury in there. Maybe if you want to look at your calendar and talk to Lupe when our civil months are versus criminal.

MR. HOGE: Thank you.
MR. TAUSEND: Thank you.
(Proceeding concluded.)

PAGING ERROR IN ORIGINAL PUBLICATION

PAGE 72a FOLLOWS PAGE 74a
ALL INFORMATION IS PRESENT

APPENDIX J – CLOVER PARK'S REPLY REGARDING STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 24, 2004

THE HONORABLE SERGIO ARMIJO
Hearing: August 27, 2004, 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County ,Washington, Petitioner, v. PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, Respondent, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Party.	No. 04-2-07167-0 CLOVER PARK'S REPLY REGARDING STEILACOOM'S MOTION OF PREJUDICE

Steilacoom Historical School District (Steilacoom) argues that the *Batson* principle has no application to a peremptory removal of a judge for racial reasons, citing and quoting from Washington cases that do not present the issue and from *People v. Superior Court,* 10 Cal.Rptr.2d 873, 8 Cal.App.4th 688 (1992). Steilacoom's position, if accepted,

would permit all racially-motivated peremptory removal of judges—no matter how egregious the circumstances--to escape scrutiny under the constitution.

One would not know it from reading Steilacoom's opposition to Clover Park's motion to vacate the order of prejudice, but the California case Steilacoom cites as the only authority on the issue actually decided that a *Batson*-type analysis is appropriate in this setting, in spite of the differences between racially-motivated peremptory challenges of jurors and racially-motivated peremptory challenges of judges:

> We conclude that these principles are applicable to race-based challenges to judges. Or, to paraphrase the United States Supreme Court, "a State's purposeful or deliberate denial ... on account of race of participation as [a judge] in the administration of justice violates the Equal Protection Clause." (*Swain v. Alabama* (1964) 380 U.S. 202, 204, 85 S.Ct. 824, 826, 13 L.Ed.2d 759, 763, citing *Ex parte Commonwealth of Virginia* (1880) 100 U.S. 339, 25 L.Ed. 676; *Gibson v. Mississippi* (1896) 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075.) Section 170.6 cannot be employed to disqualify a judge on account of the judge's race. A fortiori, section 170.6 cannot be implemented in such a way as to preclude inquiry into whether the statute has been employed to disqualify a judge on account of race.

Id., 10 Cal.Rptr.2d at 884.

Appendix J

In late February 2004, before the Puget Sound Regional Committee on School District Organization's (Regional Committee) final decision of March 25, 2004 in the present matter, Clover Park submitted the letter attached hereto as Exhibit A to the Regional Committee. The letter raised constitutional issues regarding the racial segregation, socioeconomic separation, and school funding implications of the transfer of territory at issue in this matter.

Clover Park raised these issues—which received short shrift in the initial deliberations of the Regional Committee (held prior to the undersigned's appearance in January 2004)—thoughtfully, respectfully, and in good faith. Clover Park's present counsel is knowledgeable and experienced in matters of constitutional law relating to Washington school districts, and particularly relating to Equal Protection and the State's paramount duty under Wash. const., art. 9.

The only information in the hearing record before the Regional Committee regarding the racial implications of the proposed transfer of territory is that the transfer would have the effect of separating and segregating students by race and socioeconomic status. Steilacoom did not dispute this evidence at the hearing before the Regional Committee.

At the March 3, 2004 meeting of the Regional Committee, Steilacoom characterized the Clover Park letter as "baloney." A true copy of the transcript of Steilacoom's comment is attached hereto as Exhibit B.

Before the Washington State Board of Education on Clover Park's appeal from the Regional Committee's decision, Steilacoom labeled Clover Park's same arguments as "bravado." Steilacoom's Rebuttal Brief, June 9, 2004, p. 17, true copy of excerpt attached hereto as Exhibit C.

It came as no surprise that Steilacoom, having dismissed Clover Park's arguments in such pejorative terms,

would affidavit Judge Grant rather than take the chance that she, as an African-American, would be put off by such cavalier pronouncements regarding such fundamental interests of Clover Park's high-minority, high-poverty student body.

Clover Park then had the choice to overlook the obvious issue of apparent racial motivation in Steilacoom's motion of prejudice or to place the matter before the Court for proper disposition. Clover Park chose the latter, not with any relish, and not out of any discomfort with other Pierce County judges, but with the sense that it would be wrong to let the matter pass.

Clover Park submits that the facts before the Court create an inference that racial considerations were a motivating factor in Steilacoom's decision to file an affidavit of prejudice against Judge Grant. A prima facie case having been established, it thus falls to Steilacoom to identify legitimate nonracial reasons for its action. Thereafter, Clover Park may comment as to whether Steilacoom's offered reasons appear pretextual. If the Court believes, on the basis of the available evidence and reasonable inferences therefrom, that race was a motivating factor in Steilacoom's motion of prejudice against Judge Grant, then the burden is on Steilacoom to show that it would have made the same decision without consideration of the racial factor. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n. 21 (1977).

To overcome the inference created by the facts before the Court, Steilacoom asserts in its brief—but not in any proof—that its motion of prejudice was made out of concern that Judge Grant's past private practice of law, in which she made allegations of malfeasance and mistakes against school districts, would predispose her to sympathize with Clover Park, and that her race was not a factor in Steilacoom's decision to file its motion.

Appendix J

The Steilacoom counsel who filed the motion and affidavit or prejudice asserts in his declaration of August 20 that he believed Judge Grant was prejudiced against both himself and his client, that in her former private practice Judge Grant advertised her firm as having an emphasis on litigating against school districts, that this is consistent with his own understanding and experience, and that he has a good-faith belief that Judge Grant's school district litigation experience makes it impossible for Steilacoom to receive a fair and impartial trial from her.

By this standard, no former prosecutor or public defender could become a judge and hear criminal cases. Steilacoom's emphasis on Judge Grant's prior legal career is inconsistent with Washington law's teaching that assertions of prejudice must arise from bias against the person or party, and not with respect to the subject matter of a lawsuit, *Brauhn v. Brauhn*, 10 Wn.App. 592 (1974). It is also at odds with the fact that this case involves one school district against another, and thus a general bias against school districts--even if it were demonstrated and were an otherwise appropriate ground for peremptory removal--would not rationalize removal of a judge here. Moreover, the same August 20 declaration does not deny under oath that race was a factor in filing the motion of prejudice against Judge Grant, and it does not say whether the (present tense) understandings and beliefs given were the declarant's motivating factors in filing the motion of prejudice *at the time the motion of prejudice was filed* (as opposed to a *post-hoc* justification offered for purposes of response to Clover Park's opposition). The August 20 declaration is conspicuously silent on all of those key points, and thus is more consistent with Clover Park's prima facie case than with Steilacoom's unsubstantiated denial.

The accompanying declaration of the Steilacoom superintendent suffers from the same failure to address the present issue. First, the Steilacoom superintendent did not

file the motion of prejudice (although a party may do so under the statute)—Steilacoom's counsel did—and there is no indication in the Steilacoom superintendent's declaration that he was aware of, or played any role in, the decision to file the motion of prejudice before the motion was filed. The Steilacoom superintendent notes another case in which Steilacoom has not affidavited Judge Grant, and distinguishes the two cases by saying the present case involves claims of malfeasance and errors, and the other does not. The other case (*Slatten*) was filed before Judge Grant was on the bench (and, according to the Pierce County Superior Court LINX website, is "resolved" rather than "ongoing;" it appears Judge Grant may have heard the trial on short notice). Again, though, there is no attempt to assert that the reasons now given for affidaviting Judge Grant were the ones that prevailed at the time the actual motion of prejudice was filed. Again, *post-hoc* rationalizations are provided (with no indication of personal knowledge as of the key time), and no denial under oath is made of the inference that Steilacoom's motion of prejudice was motivated in part by racial considerations.

When counsel for Clover Park and Steilacoom initially discussed this issue by telephone on August 12, 2004, Steilacoom's counsel said Steilacoom's reason for peremptory removal of Judge Grant was her past advocacy against school districts. Whether because of subsequent discovery of the *Slatten* case mentioned in the Steilacoom superintendent's August 20 declaration, or because of the difficulty in squaring that rationale with the fact that both parties in this matter are school districts, the "malfeasance and mistakes" rationale is a newly-offered one.

As explanations for assertedly race-neutral conduct shift and/or evade the key issues, the probability rises that they are not the real reasons. Clover Park therefore asserts that the Court has more than enough evidence upon which to conclude that race was a motivating factor in Steilacoom's

motion of prejudice against Judge Grant, that there is no evidence the same motion would have been made in absence of the racial consideration, and thus that the order granting Steilacoom's motion of prejudice should be set aside.

DATED this 24th day of August, 2004.

PERKINS COIE LLP

By /s/
Michael W. Hoge, WSBA #6180
Attorneys for Clover Park School District

[Exhibits Not Included]

APPENDIX K – HOGE DECLARATION IN SUPPORT OF CLOVER PARK'S REPLY MEMO REGARDING STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 24, 2004

HONORABLE SERGIO ARMIJO
Hearing: August 27, 2004, 9:00 a.m.

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY**

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner, v. PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, Respondent, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Party.	No. 04-2-07167-0 DECLARATION OF MICHAEL W. HOGE IN SUPPORT OF CLOVER PARK'S REPLY MEMORANDUM REGARDING STEILACOOM'S MOTION OF PREJUDICE

Appendix K

I, Michael W. Hoge, hereby declare as follows:

1. I am the counsel of record for Clover Park School District in this matter, and as such have personal knowledge of the facts stated herein..

2. The facts stated in the accompanying Clover Park School District's Reply Memorandum Regarding Steilacoom's Motion of Prejudice are true to the best of my knowledge. They and the exhibits attached thereto are incorporated herein.

3. During my initial telephone call with Mr. Tausend in this matter on August 12, 2004, I asked him whether Steilacoom had any nonracial reasons it could articulate for its affidavit of prejudice against Judge Grant, and he responded that her past private legal practice of litigating against school districts was the reason. I asked Mr. Tausend how that cut in a matter in which the primary adversaries are both school districts; he responded to the effect that it was a sufficient reason, but he did not say anything about claims of malfeasance or mistake.

4. I have searched the Pierce County Superior Court LINX website for cases in 2003 and 2004 (since Judge Grant assumed the bench) in which a Pierce County school district is a listed party. I have found only one other school district (non-collections) case in which Judge Grant was or is the assigned judge; she was not, or has not been, affidavited in that case.

Appendix K

I declare under penalty of perjury of the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 24th day of August, 2004.

/s/
Michael W. Hoge

APPENDIX L – STEILACOOM'S OPPOSITION TO CLOVER PARK'S MOTION TO VACATE ORDER GRANTING STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 20, 2004

Judge Armijo's Motion Calendar
Friday, August 27, 2004
9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CLOVER PARK SCHOOL DISTRICT NO. 400 OF PIERCE COUNTY, WASHINGTON, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 OF PIERCE COUNTY, WASHINGTON, Interested Parties/Defendants.	No. 04-2-07167-0 STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1'S OPPOSITION TO CLOVER PARK SCHOOL DISTRICT'S MOTION TO VACATE ORDER GRANTING STEILACOOM'S MOTION OF PREJUDICE

Appendix L

Steilacoom Historical School District ("Steilacoom") opposes CLOVER PARK SCHOOL DISTRICT'S MOTION TO VACATE ORDER GRANTING STEILACOOM SCHOOL DISTRICT'S MOTION OF PREJUDICE. Steilacoom respectfully requests that this Court reject Clover Park's unsupported assertion that RCW 4.12.040-.050 is subject to the type of analysis the Supreme Court mandated for peremptory challenges to jurors in *Batson v. Kentucky*, 476 U.S. 79 (1986). Steilacoom emphatically denies Clover Park's assertion that Steilacoom's MOTION OF PREJUDICE was "motivated by race." *See* CLOVER PARK SCHOOL DISTRICT'S OPPOSITION TO STEILACOOM SCHOOL DISTRICT'S MOTION OF PREJUDICE ("Opposition") at p. 4.

1. A Motion of Prejudice Pursuant to RCW 4.12.040-050 is Not Subject to a *Batson* Analysis

Clover Park rests its argument on the assertion that "[p]eremptory removal of judges must be analyzed under our constitution in the same way peremptory removal of jurors is analyzed." Opposition at 2. Clover Park cites no authority to support its argument. Clover Park also fails to provide any analysis as to why *Batson* should, or even could, apply in this context. A review of Washington law and the nature of the *Batson* inquiry makes clear that Clover Park's argument is incorrect.

So far as Steilacoom is aware, no Washington court has ever suggested that a motion of prejudice pursuant to RCW 4.12.040-050 must be subjected to the same analysis as peremptory challenges to jurors. To the contrary, the Washington Supreme Court "has made it abundantly clear that any party to a suit has the right to remove one superior court judge from a case subject only to the timely filing of a

motion and affidavit in compliance with RCW 4.12.040 and .050." *State v. Waters*, 93 Wn.App. 969, 974 (1999) (emphasis added). *See also State v. Belgarde*, 119 Wn.2d 711, 715 (1992) ("If a party complies with the statutory provisions, prejudice is deemed established, and the judge no longer has authority to proceed further into the merits of the case."). Clover Park cannot overcome this clear and exclusive language merely by asserting that there "must" be an exception to the unambiguous wording of RCW 4.12.040-050 that no Washington court has ever acknowledged.

Not only is there no authority to support Clover Park's argument, *Batson* analysis is ill-suited for evaluating motions of prejudice. A Batson analysis has three parts. First, the party alleging racial discrimination must establish that the peremptorily challenged juror is a member of a constitutionally recognized racial group. Second, that party must prove a prima facie case that the challenge, combined with other relevant circumstances, raises an inference of improper racial motive. Third, the party that challenged the juror may offer a race-neutral explanation for the challenge. *See State v. Rhodes*, 82 Wn.App. 192, 196 (1996) (ruling that prosecutor's peremptory challenge of a single African American juror was not racially motivated). The Washington Court of Appeals summarized the various types of "relevant circumstances" that guide the second prong of the Batson analysis.

> 1. Striking a group of jurors that are "otherwise 'as heterogeneous as the community as a whole,' sharing race as their only common characteristic."
> 2. Disproportionate use of strikes against a group.

3. The level of a group's representation in the venire as compared to the jury.
4. Race of the defendant and the victim.
5. Past conduct of the state's attorney in using peremptory challenges to excuse all African-Americans from the jury venire.
[6. Inadvertently omitted in the court's numbering]
7. Type and manner of state's questions and statements during venire.
8. Disparate impact, all or most of the challenges used to remove minorities from jury.
9. Similarities between those individuals who remain on the jury and those who have been struck.

State v. Wright, 78 Wn.App. 93, 99 (1995) (internal citations omitted) (holding that peremptory challenges of minority jurors in two criminal cases were not racially motivated). Notwithstanding adaptation of these "relevant circumstances" to civil, as opposed to criminal cases, seven of the eight circumstances identified by the Court of Appeals have no relevance at all to a motion of prejudice against a judge. Only the fifth issue could even hypothetically be relevant in this context. The substance of a *Batson* analysis is simply not appropriate to evaluate motions of prejudice.

In addition to the lack of authority supporting Clover Park's argument and the substantive problems applying *Batson* in this context, the respective roles and characteristics of judges and juries in our court system also counsel against Clover Park's argument. A jury is a panel of individuals chosen from a pool of lay people that is constitutionally

required fairly to represent the community. *See Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). Exclusion from a jury based on group destroys the representative nature of the jury pool. Indeed, *Batson* itself emphasized the unique place that the jury occupies in the American legal system.

> Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

Batson, supra, at 86 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)).

Judges hold a very different place in the American legal system. A judge is a single person chosen at random from a self-selected group of legal professionals who have been elected to their seats by the community. Although diversity on the bench is undoubtedly a positive thing, there is no constitutional requirement that the composition of the bench in a community represent a cross section of that community. Thus, the very foundation on which *Batson* and its progeny rest is entirely absent in the context of a motion of prejudice.

It is also worth noting that a peremptory challenge to a juror does not require the challenging party to support the challenge with any statement or reason. A statutory motion of prejudice against a judge, however, requires the moving

party to swear out an affidavit of prejudice against the judge. While the affidavit need not contain substantial information about the moving party's reason for believing the judge to be biased, this Court should not simply declare that the affidavit has no significance whatsoever, as Clover Park urges.

Finally, it is significant that the only court that appears to have considered this issue with regard to a comparable statute emphatically rejected the assertion that *Batson* applies in this context.[1] *See People v. Superior Court*, 8 Cal.App.4th 688, 701-05 (1992). In that case, a previous trial had ended in mistrial when it was determined that the prosecutor had used his peremptory challenges against jurors based on race. In the subsequent re-trial, the prosecutor filed with the presiding judge a motion to disqualify the trial judge under California Code of Civil Procedure section 170.6, a statute substantially similar to RCW 4.12.040-050. The defendant asserted that the prosecutor had challenged the trial judge because the trial judge was African American. The presiding judge demanded that the prosecutor reveal his reason for challenging the judge, and on hearing the prosecutor's reason for the challenge, concluded that the stated reason did not overcome the defendant's prima facie showing of "invidious discrimination." *Id.*, at 695.

---

[1] The Oregon statute that most closely parallels RCW 4.12.040-050 explicitly permits the judge being challenged or the presiding judge to challenge an affidavit of prejudice if the judge suspects the affidavit was not brought in good faith. The statute also provides for a hearing and allocates the burden of proof in that hearing to the judge challenging the affidavit. *See* Oregon Revised Statutes 14.260(1). The fact that Washington's statute contains no such provision supports Steilacoom's argument that motions of prejudice are not appropriate for scrutiny.

Appendix L

The People appealed, seeking to vacate the order disallowing the challenge. The defendant argued that statutory challenges to judges should be subject to the same *Batson* analysis as peremptory challenges to jurors. The court examined at length the differences between motions to replace judges and peremptory challenges to jurors. *See Id.*, at 701-04. Ultimately the court rejected the precise argument that Clover Park has asserted in this case. "Far from compelling, the analogy between peremptory challenges to prospective jurors and to judges is attenuated, so much so that the appropriateness of the analysis and procedures in *Batson* and [*People v. Wheeler*, 22 Cal.3d 258 (1978)] to [statutory] peremptory challenges [to judges] is hardly self-evident." *People v. Superior Court, supra*, at 704. Although the California court's holding is not binding on this Court, its reasoning illustrates why statutory challenges to judges cannot appropriately be "analyzed under our constitution in the same way peremptory removal of jurors is analyzed." Opposition at 2.

II. Steilacoom's Motion of Prejudice Survives Scrutiny Even if this Court Subjects it to an Equal Protection Analysis

Although Washington law rejects the notion that a motion of prejudice under RCW 4.12.040-050 is subject to any form of scrutiny, Steilacoom's motion of prejudice against Judge Grant would survive an equal protection analysis. The court in *People v. Superior Court* made clear that the burden of proving that a motion of prejudice against a judge was motivated by race rests squarely on the party challenging the motion. *See People v. Superior Court, supra*, at 708. Were this Court to subject Steilacoom's motion to an equal protection analysis, Clover Park would first have to

prove a prima facie case that Steilacoom's motion of prejudice was taken for a discriminatory purpose. Only if Clover Park carried this initial burden would Steilacoom be obliged to present a race-neutral justification for its motion of prejudice. *See, E.g., Rhodes, supra*, at 196.

In this case, Clover Park has failed to prove its prima facie case. Further, even if this Court were to get past the prima facie case requirement, Steilacoom's reason for filing its motion of prejudice against Judge Grant is race neutral.

A. Clover Park has Failed to Meet its Initial Burden of Proving a Prima Facie Case of Racial Discrimination

In this case, the prima facie case requirement demands that Clover Park prove both that Judge Grant is a member of a constitutionally cognizable group and that there are additional facts and relevant circumstances sufficient to raise an inference of racial discrimination. *See People v. Superior Court, supra*, at 708-09. It is undisputed that Judge Grant, as an African American, is a member of a constitutionally cognizable group. Clover Park has failed, however, to identify additional facts or circumstances sufficient to raise an inference of racial discrimination.

Clover Park relies exclusively on two facts to prove its prima facie case for racial discrimination. First, "the case is one in which issues of race and discrimination against minority students are important;" second, Steilacoom has filed a motion of prejudice against an African American judge.[2] Opposition at pp. 3-4. Clover Park does not, and

---

[2] It should be noted that Judge Grant is one of four minority judges in Pierce County, making it very likely that, as has occurred with regard to this motion, another minority judge will be assigned to this matter.

cannot offer supporting evidence or other relevant circumstance to develop a record sufficient to raise an inference of discrimination. The only *Batson* relevant circumstances inquiry that could be relevant in this case cuts in Steilacoom's favor because Clover Park has not, and cannot present this Court with any evidence that Steilacoom or its counsel has engaged in a pattern of filing motions of prejudice against minority judges.

The court in *People v. Superior Court* found that the defendant had failed to make out a prima facie case of discrimination even though he presented more evidence than Clover Park does here. The defendant in that case argued that the prosecutor's previous racially discriminatory use of peremptory challenges, combined with the fact that the judge at issue was African American, raised an inference of racial discrimination. The court rejected that argument and ruled that the defendant had failed to carry the burden of making a prima facie case of discrimination. *People v. Superior Court*, supra, at 710. The Court also rejected the argument that an "inquiry into the good faith of a [challenge to a judge] is mandated whenever the opposing party nakedly asserts that a challenge to a judge was race-based. *Id.*, at 707.

Clover Park's assertion of racial discrimination in this case is precisely the kind of "naked assertion" the court rejected in *People*. Indeed, if Clover Park is correct that the circumstances in this case are sufficient to raise an inference of racism, RCW 4.12.040-050 would be held hostage to unsupported claims of racism in every case where a minority judge presided and one party raised an issue related to race. There is no justification for such a radical reinterpretation of the clear statutory and judicial language regarding motions of prejudice.

Appendix L

B. Steilacoom Filed a Motion of Prejudice Against Judge Grant Because her Prior Practice Focused on Alleging and Proving Mistakes and Malfeasance on the Part of School Districts

Although the Court should not reach the issue of Steilacoom's reason for challenging Judge Grant, Steilacoom did not challenge Judge Grant because of her race. Steilacoom challenged Judge Grant because of concern that Judge Grant's previous emphasis on litigation against school districts would prevent her from presiding over a fair and impartial trial of this matter. *See* Declaration of Christopher Hirst ("Hirst Decl."), attached hereto as Exhibit A and incorporated herein by reference. Before Judge Grant took the bench, her practice focused on litigating claims against school districts, including claims alleging that a district was liable for malfeasance and/or mistakes. Judge Grant not only represented multiple plaintiffs in litigation against school districts, but advertised her former firm of Grant & Grant for five consecutive years from 1988 to 2002 as a firm "with the emphasis of practice placed upon sexual harassment in the workplace and schools ... [that has] litigated against . . . numerous school districts." Hirst Decl. at Exhibits A-E.

In this case, Clover Park has expressly accused Steilacoom of malfeasance in failing to negotiate with Clover Park in good faith. AMENDED APPEAL OF CLOVER PARK SCHOOL DISTRICT FROM STATE BOARD OF EDUCATION'S AND REGIONAL COMMITTEE'S DECISIONS ("Appeal") at ¶ 9(f)(iii). Clover Park has also ascribed significance to Steilacoom's mistaken submission of an inaccurate property description. Appeal at ¶ 9(f)(iv).

Steilacoom challenged Judge Grant because it is concerned that a judge whose previous practice focused on

finding and proving liability arising from malfeasance and mistakes by school districts may be predisposed to sympathize with Clover Park's allegations of malfeasance and mistakes against the Steilacoom School District. Judge Grant's race was not a factor in Steilacoom's decision to file its motion of prejudice.

For these reasons, Steilacoom respectfully requests that this Court deny CLOVER PARK SCHOOL DISTRICT'S MOTION TO VACATE ORDER GRANTING STEILACOOM SCHOOL DISTRICT'S MOTION OF PREJUDICE.

DATED this 20th day of August, 2004.

PRESTON GATES & ELLIS LLP

By /s/
Fredric C. Tausend, WSBA #03148
Christopher L. Hirst, WSBA #06178
Attorneys for Interested Party
Steilacoom Historical School District
No. 1

APPENDIX M – HIRST DECLARATION IN SUPPORT OF STEILACOOM'S AFFIDAVIT OF PREJUDICE FILED AUGUST 17, 2004

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner, v. PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, Respondent.	No. 04-2-07167-0 DECLARATION OF CHRISTOPHER HIRST

1. I, Christopher Hirst, hereby declare as follows:

2. I am over eighteen years of age. I have personal knowledge of the matters contained herein and am competent to testify thereto.

3. I am and have at all material times been a partner with the law firm of Preston Gates & Ellis. I represent Steilacoom Historical School District No. 1 ("Steilacoom School District"), an interested party in this matter.

4. On August 3, 2004, I filed with this Court an AFFIDAVIT OF PREJUDICE pursuant to RCW 4.12.050.

Appendix M

The affidavit supported Steilacoom's MOTION OF PREJUDICE, filed pursuant to RCW 4.12.040. In that affidavit, I testified to my belief that Judge Beverly G. Grant is prejudiced against myself and my client, and that by reason of such prejudice it would be impossible for my client to have a fair and impartial trial before Judge Grant.

5. From 1998 through 2002, Judge Grant, then a practicing attorney with the law firm of Grant & Grant, advertised her firm in the Martindale–Hubbell Law Directory as a firm "with the emphasis of practice placed upon sexual harassment in the workplace and schools . . . [that has] litigated against . . . numerous school districts." See Exhibits A-E attached hereto and incorporated herein by reference.

6. This Martindale-Hubbell listing is consistent with my personal understanding of and experience with Judge Beverly G. Grant's prior law practice.

7. I have a good faith belief that Judge Grant's recent and long-standing emphasis on litigation against school districts makes it impossible for my client to receive a fair and impartial trial before Judge Grant.

I declare under penalty of perjury that the foregoing is true and correct:

EXECUTED this 17th day of August, 2004 at Seattle, WA.

/s/
CHRISTOPHER HIRST

[Exhibits Not Included]

APPENDIX N – DECLARATION OF ARTHUR HIMMLER IN SUPPORT OF STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 17, 2004

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner, v. PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, Respondent.	No. 04-2-07167-0 DECLARATION OF ARTHUR HIMMLER

1. I, Dr. Arthur Himmler, hereby declare as follows.

2. I am over eighteen years of age. I have personal knowledge of the matters contained herein and am competent to testify thereto.

3. I am and have been at all material times the Superintendent of Steilacoom Historical School District No. 1 ("Steilacoom School District").

Appendix N

4. I have also served for more than ten years as a member of the Board of Directors of the Washington Schools Risk Management Pool, a self-insured pool that provides insurance coverage for dozens of school districts in WA.

5. Through my work with the Washington Schools Risk Management Pool, I am familiar with the claims and litigation in which Judge Beverly G. Grant participated during her practice. My experience is consistent with the description of Judge Grant's practice in the Martindale Hubbell Law Directory listing attached hereto as Exhibit A. More specifically, my experience with Judge Grant is that she regularly litigated claims of malfeasance and mistakes against school districts.

6. I am aware of the ongoing litigation in the matter of Slatten v. Town of Steilacoom and Steilacoom Historical School District No. 1, Pierce County Cause No. 01-2-13786-2. That case does not involve allegations of wrongful conduct or errors on the part of the Steilacoom School District. Rather, the case involves a dispute over the meaning of an agreement the Steilacoom School District entered into at the direction of the Town of Steilacoom.

7. The Steilacoom School District has not filed a motion of prejudice against Judge Grant in the Slatten matter.

I declare under penalty of perjury that the foregoing is true and correct:

EXECUTED this ___ day of August, 2004 at _____.

_____

Dr. Arthur Himmler

APPENDIX O – CLOVER PARK'S MOTION TO VACATE ORDER GRANTING STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 12, 2004

HONORABLE BEVERLY G. GRANT

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	No. 04-2-07167-0 CLOVER PARK SCHOOL DISTRICT'S MOTION TO VACATE ORDER GRANTING STEILACOOM'S MOTION OF PREJUDICE Note for Motion Calendar: August 20, 2004, 9:00 a.m.

Appendix O

I. MOTION

Clover Park School District ("Clover Park") moves that the Court's Order of August 3, 2004, which summarily granted Steilacoom's Motion of Prejudice on the same day it was filed, be vacated.

II. GROUNDS FOR MOTION AND RELIEF SOUGHT

Steilacoom Historical School District (Steilacoom) filed a motion of prejudice against Judge Beverly Grant on August 3, 2004, noting the motion for August 13, 2004. The Court signed the motion on August 3, before Clover Park School District filed its August 6, 2004 Opposition to Steilacoom's Motion. A copy of the (stamped, not signed) order was received by Clover Park's counsel on August 9, 2004.

Clover Park's motion to vacate is based upon the grounds set forth in its Opposition to Steilacoom School District's Motion of Prejudice filed August 6, 2004. Clover Park additionally notes that *Brauhn v. Brauhn*, 10 Wn. App. 592, 518 P.2d 1089 (1974), requires that a judge's bias exist with respect to the person of the party litigant, and not simply with respect to the subject matter of the lawsuit, in order to justify her removal.

Clover Park further notes that the second-filed of the two cases to be consolidated here was assigned upon filing to Department 7, Judge Fredrick W. Fleming. Clover Park's objection to Steilacoom's Motion of Prejudice against Judge Grant is not reflective of any discomfort with Judge Fleming, but only with the apparent impropriety of Steilacoom's motion of prejudice under the *Batson* principles.

Appendix O

A proposed form of order is attached hereto. It deals with both the pending Clover Park Motion to Consolidate (which all parties have indicated to the undersigned that they do not oppose) and with the Clover Park Motion to Vacate the order granting Steilacoom's motion of prejudice against Judge Grant.

DATED this 12 day of August, 2004.

PERKINS COIE LLP

By /s/
Michael W. Hoge, WSBA #6180
Attorneys for Clover Park School District

APPENDIX P – HOGE DECLARATION IN SUPPORT OF CLOVER PARK'S MOTIONS TO CONSOLIDATE AND TO VACATE ORDER GRANTING STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 12, 2004

BEVERLY G. GRANT
Hearing: August 20, 2004, 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce, County ,Washington, Petitioner, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Party.	No. 04-2-07167-0 DECLARATION OF MICHAEL W. HOGE IN SUPPORT OF CLOVER PARK SCHOOL DISTRICT'S MOTION TO CONSOLIDATE AND MOTION TO VACATE ORDER GRANTING STEILACOOM SCHOOL DISTRICT'S MOTION OF PREJUDICE

I, Michael W. Hoge, hereby declare as follows:

Appendix P

1. I am the counsel of record for Clover Park School District in this matter, and as such have personal knowledge of the facts stated herein..

2. The facts stated in the accompanying Clover Park School District's Motion to Vacate Order Granting Steilacoom's Motion of Prejudice are true to the best of my knowledge.

3. Counsel for all three other parties (Ms. Anne Shaw for the Puget Sound ESD Regional Committee; Mr. David Stolier for the Washington State Board of Education; and Mr. Fredric Tausend for Steilacoom School District) have informed me that they have no objection to Clover Park's Motion to Consolidate.

4. Mr. Tausend called me this morning and said he would be stepping in for Mr. Hirst on this matter. We discussed the possibility of any hearing on the pending motions being on Friday, August 27 instead of on Friday, August 20 as established yesterday with Judge Grant's bailiff (attached hereto as Exhibit A is a copy of an email message I sent yesterday to counsel for the other parties). Clover Park has no objection to the later date but does not presume to change the date without making appropriate arrangements with the Court.

I declare under penalty of perjury of the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 12th day of August, 2004.

/s/
Michael W. Hoge

Appendix P

Hoge, Mike-SEA

From: Hoge, Mike-SEA
Sent: Wednesday, August 11, 2004 4:17 PM
To: Anne O. Shaw (E-mail)_; David A. Stolier (E-mail); Chris Hirst (E-mail)
Subject: Hearing on pending matters in Clover Park/Steilacoom territory transfer case in Pierce County Superior Court

I spoke with Dave Stolier early last week, shortly before he left for a vacation that lasts through this week, and at that time, with only Clover Park's motion to consolidate pending, he was OK with my representing to the court that he had no objection to the motion to consolidate. Now, with the matter of Steilacoom's motion of prejudice regarding Judge Grant also having been filed and opposed, and with nothing I've seen from the court naming a new judge if Judge Grant is removed, I called Judge Grant's bailiff today to say we'd prefer to bump our motion a week, to the 20th, in light of the absence of one party's lawyer and the lack of information about who might hear the pending matters. I was informed that Judge Grant wishes to hear the pending matters and that a delay to Aug. 20 is OK provided I inform the other counsel in the case, which I hereby do. It is my understanding that we are on the 9 a.m. calendar with Judge Grant on Friday Aug. 20.

Mike Hoge
PERKINS COIE LLP
1201 Third Ave., Suite 4800
Seattle, WA 98101-3099
Phone: (206) 359-8900
Fax: (206) 359-9000
Email: mhoge@perkinscoie.com

EXHIBIT A

APPENDIX Q – CLOVER PARK'S OPPOSITION TO STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 6, 2004

HONORABLE BEVERLY G. GRANT
Hearing: August 13, 2004, 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner, v. PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, Respondent, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Party.	No. 04-2-07167-0 CLOVER PARK SCHOOL DISTRICT'S OPPOSITION TO STEILACOOM SCHOOL DISTRICT'S MOTION OF PREJUDICE

Steilacoom Historical School District (Steilacoom) has noted for hearing on August 13, 2004 its Motion of Prejudice dated August 3, including its counsel's sworn affidavit stating he "believes the Honorable Beverly G. Grant

is prejudiced against affiant and defendant, and the affiant believes that by reason of such prejudice he and his client cannot have a fair and impartial trial before said Judge."

Ordinarily, of course, the mere assertion of a belief that the Court is prejudiced against a party and its counsel is sufficient under RCW 4.12.040 and -.050 to accomplish transfer of a case. *See, e.g., State v. Cockrell*, 102 Wn.2d 561, 689 P.2d 32 (1984). And in the present matter, to be sure, Steilacoom's counsel has followed the common practice of asserting under oath a belief that the Court is prejudiced against him and his client.

However, the statutory option for removal of a judge in such fashion must yield to constitutional considerations. There is no constitutional right to peremptory removal of a judge, *In re Welfare of McGee*, 36 Wn.App. 660, 679 P.2d 933 (1984).

Peremptory removal of judges must be analyzed under our constitution in the same way peremptory removal of jurors is analyzed. For many years, until *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and its progeny, peremptory removal of minority jurors by state actors in cases involving minority parties was permitted. But no more: now, upon a prima facie showing that race has been a factor in a state actor's removal of minority jurors, the burden shifts to the state actor to come forward with a neutral explanation for challenging minority jurors related to the particular case to be tried. It is not enough for the state actor to assert an intuitive judgment, or that the race of the object of the peremptory challenge would make the juror partial to the other party; rather, there must be articulated a neutral explanation related to the particular case being tried. This is a requirement of Equal Protection, and is not a Sixth

Amendment doctrine. Similarly, a party such as Clover Park has a right to not have its judge peremptorily dismissed for racial reasons.

Washington's constitution provides at least as much protection to the rights of minority persons as does the federal Equal Protection Clause. *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn.2d 791, 83 P.2d 419 (2002). Thus, Clover Park is entitled to have its objection to Steilacoom's attempted disqualification of Judge Grant considered according to standards at least as favorable as those under the Fourteenth Amendment.

This case is one in which Clover Park has made conspicuous and important claims under the Washington constitution that the boundary change being litigated would have racially segregative effects. Clover Park's Amended Appeal, 9(f)(ii), p. 7. Clover Park has pointed out that its student body is roughly half minority, and that its proportion of African-American students is second-highest in the State (only Seattle has a fractionally-higher proportion of African-American students, according to the record and according to official statistics maintained by the State Superintendent of Public Instruction). *See* Record before the Regional Committee and State Board, soon to be transmitted to the Court. Clover Park has standing to assert the rights of its students under article 9, section 1 and 2 of our constitution, *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), and is doing so in this matter. Moreover, the rights and interests of Clover Park and its substantially-minority student body are not the only important interests at stake here: this matter affects the entire community and reflects on the integrity of the judicial system as a whole.

Appendix Q

Judge Grant was originally assigned this case when it was filed in April 2004. It appears she is one of the very few African-American members of the Pierce County Superior Court bench. Yet without stating any reason, Steilacoom, a state actor, has attempted to peremptorily remove her from the matter. Clover Park has made out a prima facie case that Steilacoom's action is improperly motivated by race: the case is one in which issues of race and discrimination against minority students are important; Judge Grant is African-American; and Steilacoom offers no justification at all for asserting that Judge Grant is prejudiced toward Steilacoom and its counsel. Indeed, there appears to be little possibility that Steilacoom's action is motivated by anything other than racial considerations. Steilacoom now must persuade the Court that its affidavit of prejudice was filed for non-racial reasons.

Any action taken on Steilacoom's motion prior to the time for which it has been noted (August 13 at 9 a.m.) will, of course, be subject to vacation upon motion by Clover Park. *State v. Superior Court of Lewis County*, 106 Wash. 507, 180 P. 481 (1919).

DATED this 6th day of August, 2004.

PERKINS COIE LLP

By: /s/
Michael W. Hoge, WSBA #6180
Attorneys for Clover Park School District

APPENDIX R – HOGE DECLARATION IN SUPPORT OF CLOVER PARK'S OPPOSITION TO STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 6, 2004

HONORABLE BEVERLY G. GRANT
Hearing: August 13, 2004, 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner, v. PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, Respondent, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Party.	No. 04-2-07167-0 DECLARATION OF MICHAEL W. HOGE IN SUPPORT OF CLOVER PARK SCHOOL DISTRICT'S OPPOSITION TO STEILACOOM SCHOOL DISTRICT'S MOTION OF PREJUDICE

I, Michael W. Hoge, hereby declare as follows:

Appendix R

1. I am the counsel of record for Clover Park School District in this matter, and as such have personal knowledge of the facts stated herein..

2. The facts stated in the accompanying Clover Park School District's Opposition to Steilacoom School District's Motion of Prejudice are true to the best of my knowledge.

I declare under penalty of perjury of the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 6th day of August, 2004.

/s/
Michael W. Hoge

APPENDIX S – ORDER GRANTING STEILACOOM'S MOTION OF PREJUDICE ENTERED AUGUST 3, 2004

HONORABLE BEVERLY G. GRANT
Note for Motion Calendar:
August 13, 2004, 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNT OF PIERCE

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, And PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	No. 04-2-07167-0 ORDER

Appendix S

THIS MATTER having come on and to be heard before the undersigned, Interested Party/Defendant Steilacoom Historical School District No. 1 having appeared through attorney Christopher L. Hirst, Petitioner/Plaintiff having appeared through attorney Michael A. Hoge, Interested Party/Defendant Puget Sound Educational Service District Regional Committee on School District Organization having appeared through attorney Anne O. Shaw, and Response/Defendant Washington State Board of Education having appeared through attorney David A. Stolier, and the Court having considered the following documents:

1. Steilacoom Historical School District No. 1's Motion of Prejudice; and

2. Affidavit of Prejudice of Christopher L. Hirst

NOW, THEREFORE, IT IS HEREBY ORDERED:

Steilacoom Historical School District No. 1's Motion is GRANTED. Pursuant to RCW 4.12.040-050 and Pierce County Local Rule 40, this action shall be transferred to another department. The parties are directed to contact the court administrator for assignment to a different department and receipt of an amended case schedule from the new department.

DONE this 3rd day of Aug., 2004.

/s/
The Honorable Beverly G. Grant

Presented by:

PRESTON GATES & ELLIS LLP

/s/
Christopher L. Hirst, WSBA #06178
Attorneys for Interested Party
Steilacoom Historical School District No. 1

APPENDIX T – STEILACOOM'S MOTION OF PREJUDICE FILED AUGUST 3, 2004

HONORABLE BEVERLY G. GRANT
Note for Motion Calendar:
August 13, 2004, 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNT OF PIERCE

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, And PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	No. 04-2-07167-0 STEILACOOM'S HISTORICAL DISTRICT NO. 1'S MOTION OF PREJUDICE Note for Motion Calendar: Aug. 13, 2004, 9:00 a.m.

Appendix T

The undersigned attorney for the Interested Party/ Defendant Steilacoom Historical School District No. 1, based on the affidavit of Christopher L. Hirst submitted herewith, hereby moves the Court for a transfer of this action from the Honorable Beverly G. Grant to another department. This motion is based on RCW 4.12.040-.050. Judge Grant has not made any discretionary decisions in this case to date.

DATED this 3rd day of August, 2004.

PRESTON GATES & ELLIS LLP

By /s/
Christopher L. Hirst, WSBA #06178
Attorneys for Interested Party
Steilacoom Historical School District
No. 1

APPENDIX U – AFFIDAVIT OF PREJUDICE FILED AUGUST 3, 2004

HONORABLE BEVERLY G. GRANT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNT OF PIERCE

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, And PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	No. 04-2-07167-0 AFFIDAVIT OF PREJUDICE

Appendix U

AFFIDAVIT

STATE OF WASHINGTON)
: ss
COUNTY OF KING)

Christopher L. Hirst, being first duly sworn, on oath deposes and says:

That he is one of the attorneys of the Interested Party/ Defendant Steilacoom Historical School District No. 1 in the above-entitled action, that he believes that the Honorable Beverly G. Grant is prejudiced against affiant and defendant, and the affiant believes that by reason of such prejudice he and his client cannot have a fair and impartial trial before said Judge. No counterclaim has been filed in this case, and Judge Grant has not made any discretionary decisions to date in this case.

/s/
Christopher L. Hirst, WSBA #06178

SIGNED AND SWORN TO before me on August 3, 2004 by Christopher L. Hirst

/s/
Peter Butterfield
NOTARY PUBLIC

My appointment expires: 8/29/06

APPENDIX V – CLOVER PARK'S AMENDED APPEAL FROM STATE BOARD OF EDUCATION'S AND REGIONAL COMMITTEE'S DECISIONS FILED JULY 20, 2004

THE HONORABLE BEVERLY G. GRANT

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	No. 04-2-07167-0 AMENDED APPEAL OF CLOVER PARK SCHOOL DISTRICT FROM STATE BOARD OF EDUCATION'S AND REGIONAL COMMITTEE'S DECISIONS

Appendix V

FOR ITS AMENDED PETITION pursuant to CR 15(a), RCW 34.05.546, RCW 34.05.570 (and related provisions of RCW Ch. 34.05), RCW 28A.315.205(5)(b), RCW 28A.315.315, and RCW 28A.645.010, the Clover Park School District No. 400 ("Clover Park") states:

1. Clover Park is a Washington State school district located in Pierce County, Washington.

2. Steilacoom School District No. 1 ("Steilacoom") is a Washington State school district located in Pierce County, Washington.

3. The Puget Sound Educational Service District Regional Committee on School District Organization ("Regional Committee") is a governmental body constituted under RCW 28A.315.105 to, *inter alia*, hear and make initial decisions on matters of school district boundaries, in accordance with RCW Ch. 28A.315 and other applicable provisions of law, for school districts served by the Puget Sound Educational Service District (which serves King and Pierce counties and Bainbridge Island according to the provisions of RCW Ch. 28A.310, RCW Ch. 28A.315, and other applicable provisions of law).

4. The Washington State Board of Education ("State Board") is a governmental body constituted under, *inter alia*, RCW Ch. 28A.305; among its duties is the hearing of appeals from decisions of the Regional Committee pursuant to RCW 28A.315.205(5).

5. By written decisions dated March 25, 2004 (copies attached hereto as Exhibit A, 7 pp.), the Regional Committee, acting on a petition by Steilacoom under RCW Ch. 28A.315 for transfer of territory to Steilacoom from Clover Park, (1) approved a transfer of territory; and (2) approved an adjustment of assets and liabilities between the two districts,

i.e., determined the timing of boundary changes and changes in taxing authority related to the transfer of territory.

6. Clover Park timely appealed to the State Board of Education, under RCW 28A.315.205(5), the Regional Committee's decision on transfer of territory, and, to the extent appropriate and necessary in the event the Regional Committee's decision on transfer of territory were not ultimately upheld, the Regional Committee's decision on adjustment of assets and liabilities.

7. Clover Park's initial Petition in this matter was filed in this Court on April 21, 2004 for the following stated reason: "If that appeal [to the State Board of Education] is successful, the related Regional Committee decision regarding adjustment of assets and liabilities should be rendered without legal force or effect; however, in view of the ambiguous structure of RCW Ch. 28A.315 and the wording of RCW 28A.315.315, Clover Park wishes to have protection against the possibility that a failure to appeal to this Court the decision on adjustment of assets and liabilities could later be asserted to have waived Clover Park's objections to the assets and liabilities consequences of the otherwise-invalidated transfer." Clover Park retains this aspect of its original Petition to the full extent it may ever be necessary to assert again.

8. By written decision of June 28, 2004 (copy attached hereto as Exhibit B, 2 pp.), the State Board declined to overturn the Regional Committee's March 25, 2004 decision on transfer of territory.

9. This Amended Petition seeks review of the State Board's June 28, 2004 decision attached as Exhibit B. Pursuant to RCW 34.05.546, the following information and elements are asserted:

Appendix V

(a) The name and mailing address of the petitioner:

Clover Park School District No. 400
c/o Dr. Doris McEwen Walker,
Superintendent
10903 Gravelly Lake Dr. SW
Lakewood, Washington 98499-1341

(b) The name and mailing address of the petitioner's attorney:

Michael W. Hoge
Perkins Coie LLP
1201 Third Ave., Suite 4800
Seattle, Washington 98101-3099

(c) The name and mailing address of the agenc[ies] whose action is at issue:

Washington State Board of Education
c/o Larry Davis, Executive Director
P.O. Box 47206
Olympia, Washington 98504-7206

Puget Sound ESD Regional
Committee on
School District Organization
c/o Monte Bridges, Superintendent
400 SW 152nd St.
Burien, Washington 98166-2209

(d) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action:

The State Board action at issue is the decision attached as Exhibit B hereto. The Regional Committee action at

issue is the decisions attached as Exhibit A hereto.

(e) Identification of persons who were parties in any adjudicative proceedings that led to the agency action:

No natural persons were parties to the State Board's proceedings; rather, only Clover Park and Steilacoom participated in the State Board's review of the Regional Committee's March 25, 2004 decisions. Only Clover Park and Steilacoom were parties to the proceedings before the Regional Committee.

(f) Facts to demonstrate that the petitioner is entitled to obtain judicial review; the petitioner's reasons for believing that relief should be granted:

As set forth more fully in the record before the Regional Committee and the record before the State Board, the decision to transfer the territory at issue in this matter was reached by unlawful procedure and decision-making process, is not supported by substantial evidence as to the key issues, is arbitrary and capricious in its failure to observe the requirements of law (and in the State Board's failure to follow its own prior approach to deciding such cases), is inconsistent with a proper interpretation of the statutory criteria for decisionmaking in these matters, and is inconsistent with and in violation of the Washington Constitution, article 1, section 12 and article 9, sections 1 and 2.

The State Board's June 28, 2004 decision failed, contrary to RCW 34.05.461(3) and (4), to make specific findings and conclusions, based on the evidence and matters officially noticed, as to each of the separate grounds

advanced by Clover Park for relief from the Regional Committee's March 25, 2004 decisions.

To the prejudice and detriment of Clover Park and its students, the decisions of both the Regional Committee and the State Board are inconsistent with law as stated above and in the following enumerated ways:

i. The transfer of territory at issue would greatly exacerbate substantial existing disparities between Clover Park and Steilacoom in assessed property valuation per pupil. Clover Park's assessed valuation per pupil is well below the state average; Steilacoom's is already at or above the state average. Steilacoom's current assessed value per pupil is already 174% of Clover Park's, and would grow to 228% of Clover Park's under the transfer, even before substantial additional anticipated growth in the developing portions of the disputed territory. These disparities would further adversely affect Clover Park's already-difficult efforts to pass maintenance and operations (M&O) levies for the general fund, as well as its efforts, unsuccessful in recent years, to pass a bond issue to fund needed capital improvements. (Local school districts receive no capital funding from the State unless and until they first pass a bond issue by 60% or more favorable votes, and thus the effect of great disparities in property valuation is most acute as to school districts' ability to finance school building and renovation, which are aspects of constitutionally adequate provision of education that are just as necessary as teachers and books.)

ii. The transfer of territory at issue would exacerbate existing racial and socioeconomic divisions between Clover Park and Steilacoom. Clover Park has more than 47% minority students, and over half the total student body is eligible for free-and-reduced lunch based on family income. Steilacoom's corresponding figures are much lower,

and the record is uncontroverted that the transfer will exacerbate the disparities.

iii. Prior to the hearing before the Regional Committee, Steilacoom refused to negotiate in good faith concerning its transfer proposal. The Regional Committee failed to require good-faith negotiations, overlooked Steilacoom's refusal, and scheduled a hearing upon Steilacoom's premature request while the statutory negotiations period was still running. The Regional Committee's incorrect directions to the parties, which indicated that negotiations must occur over the whole territory (which is true only for citizen-initiated petitions) instead of noting correctly that compromise solutions could emerge from the required negotiations on district-initiated petitions, compounded the failure.

iv. Steilacoom submitted an incorrect property description for its proposal, contrary to the requirement of the statute and the rules of the Regional Committee, and never properly corrected it. Contrary to the State Board's apparent understanding stated in its decision of June 28, 2004 (which declined to find a procedural irregularity in the failure of the Steilacoom School Board to submit an accurate description), the Regional Committee acted upon the incorrect description and did not simply treat the Steilacoom petition as amended according to Steilacoom's intent.

v. The Regional Committee's decision-making process was distorted by its express reliance upon a "Criteria Checklist" that improperly underemphasized constitutionally-significant criteria and overemphasized one example sub-factor having no constitutional significance (*i.e.*, the "master planned community" example, which itself was improperly applied to the territory in question even though it is not "planned" but rather "in planning"). The

Appendix V

Regional Committee thus improperly interpreted the reorganization statute; the State Board improperly disregarded the Regional Committee's statutory interpretation and constitutional errors. The approach of both bodies—declining to consider claims of constitutional wrong and being satisfied merely with statutory criteria being "considered" in some fashion—is contrary to law and permits all constitutional violations to be disregarded. The State Board's assertion in the June 28, 2004 decision that its review is confined to whether arbitrary and capricious action or procedural error is shown is inconsistent with its approach in the appeal it most recently heard prior to the present matter.

vi. The Regional Committee's final written decision on transfer of territory of March 25, 2004 was stated to be on different grounds than the Regional Committee's original decision voted on November 25, 2003, yet there was no Regional Committee discussion or other action in open meeting explaining the change. On information and belief, based on this and other indications, the Regional Committee's decision was reached in violation of the Open Meetings Law, RCW Ch. 42.30, and thus is void.

vii. The Regional Committee's lack of adequate overall procedures for conduct of these matters is itself a procedural irregularity that contributed to its decisional error, and the State Board's disregard of this and the procedural defects noted by Clover Park perpetuates the error. Review confined to the Regional Committee record before the State Board—which itself was an incomplete record of a largely unregulated process before the Regional Committee in which all offered information was heard, and no findings of fact or conclusions of law were reached—is insufficient process, especially without appropriate strict scrutiny and analysis, to protect fundamental and paramount constitutional rights.

Appendix V

(g) A request for relief, specifying the type and extent of relief requested:

Clover Park respectfully requests that the decisions of the Regional Committee and State Board be set aside; that the Regional Committee's March 25, 2004 decision on adjustment of assets and liabilities be deemed of no legal force or effect in the event the Regional Committee's related March 25, 2004 decision on transfer of territory is not finally approved; that it be permitted to modify its petition to take into appropriate account other developments; that it be awarded its costs and statutory fees; and that any other relief that the Court deems appropriate be awarded.

FURTHER, invoking the Court's inherent jurisdiction under article 4, sections 1 and 6 of the Washington constitution, Clover Park reasserts all of the factual allegations in enumerated sections 1 through 9 above. Clover Park claims that the subject decisions of the Regional Committee and State Board are legally defective for the reasons stated in section 9(f) above. Having stated these claims, Clover Park respectfully prays that the decisions of the Regional Committee and State Board be set aside, for its costs and fees, for permission to amend its claims to take into appropriate account other developments, and for other relief that the Court deems appropriate.

DATED this 20th day of July, 2004.

PERKINS COIE LLP

By /s/
Michael W. Hoge, WSBA #6180
Attorneys for Clover Park School District

[Exhibits Not Included]

APPENDIX W – DECISION OF THE STATE BOARD OF EDUCATION DATED JUNE 28, 2004

BEFORE THE STATE BOARD OF EDUCATION

Decision on School District Boundary Appeal 04-02
by Clover Park School District

The Clover Park School District appeals a decision by the Puget Sound Educational Service District Regional Committee on School District Organization (Regional Committee) to transfer territory from the Clover Park School District to the Steilacoom School District. Having considered the record, the written briefing, and arguments of counsel, the State Board of Education concludes that the Regional Committee's decision was not arbitrary and capricious and that the Regional Committee followed applicable procedures.

The appeal to the State Board provided in RCW 28A.315.205(5) is limited. The State Board is empowered to consider two bases for appeal. If the State Board finds that the Regional Committee failed to follow applicable statutory and regulatory procedures or acted in an arbitrary and capricious manner, it must refer the matter back to the Regional Committee with an explanation of the State Board's findings. The statute does not allow the State Board to substitute its judgment for the Regional Committee's and to make a different decision.

Arbitrary and Capricious

RCW 28A.315 grants the regional committee substantial latitude in judgment, as long as it gives consideration to the criteria set forth in statute. Transfer decisions are to be made by the regional committee based on the committees' best

judgment taking into consideration the factors set forth in RCW 28A.315.015 and 28A.315.205. RCW 28A.315.015(2). The parties do not appear to be in disagreement as to the arbitrary and capricious standard. Action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Hillis v. State*, 131 Wn.2d 373 (1997). Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. Rios v. Dept. of Labor and Industries, 145 Wn.2d 483 (2002).

Regardless of what we think about the merits of the criteria currently set forth in statute, or the merits of the decision that the regional committee came to, our role is to decide whether the regional committee made a permissible decision under the standards cited above. We are unable to say that the regional committed acted in an arbitrary and capricious manner in exercising its judgment. The record demonstrates that the committee considered each of the criteria required to be considered RCW 28A.315 and exercised its judgment.

Failure to Follow Applicable Procedures

The Board is unable to identify procedures that the Regional Committee failed to follow in hearing this matter. Without passing judgment on the negotiating tactics that were raised at hearing, the Board considers it a public obligation for school districts to negotiate in good faith on boundary transfer proposals. However, we do not find the negotiation between the districts to be a procedure applicable to the regional committee. The regional committee's jurisdiction begins when negotiations have been unsuccessful.

With regards to the clerical error in the legal description, we are unable to attribute a procedural error to the Regional

Committee. The record establishes that both of the parties and the Regional Committee treated the territory in dispute as that territory identified on the maps, including all of Northwest Landing, and not including any federal property on Fort Lewis. The record does not support a finding that anyone was misled or confused about what territory was being considered for transfer. Steilacoom subsequently submitted a legal description conforming to the area as shown on the maps, as discussed by all parties, and as considered by the Regional Committee.

Constitutional Issues

Clover Park has raised a number of constitutional arguments that the Board declines to address . The impacts of a boundary decision on constitutional questions such as equal protection, or equity and adequacy of school financing are outside the Board's purview in considering boundary transfer appeals. These are matters that are best addressed by the courts or the legislature.

APPENDIX X – ORDER SETTING CASE SCHEDULE
FILED APRIL 21, 2004

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

NO. 04-2-07167-0

ORDER SETTING CASE SCHEDULE

Type of Case:	MSC
Track Assignment:	Standard
Assigned Department:	18-Judge BEVERLY G. GRANT
Docket Code:	ORSCS

Appendix X

APPENDIX Y – FINDINGS AND DECISIONS OF REGIONAL COMMITTEE TO TRANSFER TERRITORY DATED MARCH 24, 2004

FINDINGS AND DECISION OF THE REGIONAL COMMITTEE SERVING THE PUGET SOUND EDUCATIONAL SERVICE DISTRICT SERVICE AREA

CONCERNING PETITION TO TRANSFER TERRITORY FROM THE CLOVER PARK SCHOOL DISTRICT NO. 400 TO THE STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 BOTH LOCATED IN PIERCE COUNTY, WASHINGTON

DECISION TO TRANSFER TERRITORY

FINDINGS

The Regional Committee for the Puget Sound Educational Service District service area held a hearing on November 5, 2003 regarding the Petition to Transfer Territory described in Attachment A from the Clover Park School District No. 400 to the Steilacoom Historical School District No. 1. The hearing was continued on November 25, 2003 and again on March 3, 2004. The factors considered during the hearing process are as follows:

1. A balance of local petition requests and the needs of the statewide community at large in a manner that advances the best interest of public education in the affected school districts and communities, the educational service district, and the state.

Appendix Y

2. Responsibly serving all of the affected citizens and students by contributing to logical service boundaries and recognizing a changing economic pattern within the educational service districts of the state.
3. Enhancing the educational opportunities of pupils in the territory by reducing existing disparities among the affected school districts' ability to provide operating and capital funds through an equitable adjustment of the assets and liabilities of the affected districts.
4. Promoting a wiser use of public funds through improvement in the school district system of the educational service districts and the state.
5. Student educational opportunities as measured by the percentage of students performing at each level of the statewide mandated assessments and data regarding student attendance, graduation, and dropout rates.
6. The safety and welfare of pupils. For the purpose of this subsection, "safety" means freedom or protection from danger, injury, or damage and "welfare" means a positive condition or influence regarding health, character, and well-being.
7 The history and relationship of the property affected to the students and communities affected, including, for example, inclusion within a single school district, for school attendance and corresponding tax support purposes, of entire master planned communities that were or are to be developed pursuant to an integrated commercial and residential development plan with over one thousand dwelling units.
8. Whether or not geographic accessibility warrants a favorable consideration of a recommended change in school district organization, including remoteness or isolation of places of residence and time required to travel to and from school.

Appendix Y

9. All funding sources of the affected districts, equalization among school districts of the tax burden for general fund and capital purposes through a reduction in disparities in per pupil valuation when all funding sources are considered, improvement in the economies in the administration and operation of schools, and the extent the proposed change would potentially reduce or increase the individual and aggregate transportation costs attic affected school districts.
10. Criteria or considerations established in rule, Washington Administrative Code 18024, by the state board of education.

DECISION

The proposed transfer of territory described in Attachment A is hereby approved and transferred from the Clover Park School District No. 400 to the Steilacoom Historical School District No. 1 effective September 1, 2008.

Signed /s/

Susan Nelson, Chair

Date: 3/25/04

Appendix Y

EXHIBIT A

PARCEL 1:

THAT PORTION OF SECTIONS 14, 22, 23, 24, 25 AND 26, TOWNSHIP 19 NORTH, RANGE 1 EAST, W.M., IN PIERCE COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE EAST LINE OF SECTION 15, TOWNSHIP 19 NORTH, RANGE 1 EAST, W.M. WITH THE SHORE LINE OF PUGET SOUND, ALSO BEING THE TRUE POINT OF BEGINNING;
THENCE SOUTH ALONG SAID EAST LINE TO THE NORTHEAST CORNER OF SAID SECTION 22;
THENCE SOUTH ALONG THE EAST LINE OF SAID SECTION 22 TO THE NORTHEAST CORNER OF THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER OF SAID SECTION 22;
THENCE WEST ALONG THE NORTH LINE OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER TO THE NORTHWEST CORNER OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER;
THENCE SOUTH ALONG THE WEST LINE OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER TO THE SOUTHWEST CORNER OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER;
THENCE EAST ALONG THE SOUTH LINE OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER TO THE SOUTHEAST CORNER OF SAID SOUTHEAST QUARTER OF THE NORTHEAST QUARTER;

Appendix Y

THENCE SOUTH ALONG THE WEST LINE OF SAID SECTIONS 23 AND 26 TO THE SOUTHWEST CORNER OF THE NORTH QUARTER OF SAID SECTION 26;
THENCE EAST ALONG THE SOUTH LINE OF SAID NORTH QUARTER TO THE EAST LINE OF SAID SECTION 26;
THENCE CONTINUING EAST ALONG THE SOUTH. LINE OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 25 TO THE SOUTHEAST CORNER OF SAID NORTHWEST QUARTER OF THE NORTHWEST QUARTER;
THENCE SOUTH ALONG THE WEST LINE OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SAID SECTION 25 TO THE SOUTHWEST CORNER OF SAID SOUTHEAST QUARTER OF THE NORTHWEST QUARTER;
THENCE EAST ALONG THE SOUTH LINE OF SAID SOUTHEAST QUARTER OF THE NORTHWEST QUARTER TO THE NORTHWEST CORNER OF THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SAID SECTION 25;
THENCE SOUTH ALONG THE WEST LINE OF THE SAID NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER TO THE SOUTHWEST CORNER OF SAID NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER;
THENCE EAST ALONG THE SOUTH LINE OF SAID NORTHEAST QUARTER OF THE

Appendix Y

NORTHEAST QUARTER OF THE SOUTHWEST QUARTER TO THE WEST LINE OF DUPONT-STEILACOOM ROAD; THENCE NORTH ALONG THE WEST LINE OF DUPONT-STEILACOOM ROAD TO THE SOUTHERLY LINE OF THE PUGET SOUND OUTFALL CHANNEL AS CONVEYED BY INSTRUMENT RECORDED UNDER RECORDING NO. 1674527;
THENCE NORTHWESTERLY ALONG THE SOUTH LINE OF SAID PUGET SOUND OUTFALL CHANNEL TO THE WEST LINE OF FORT LEWIS LYING BETWEEN FORT LEWIS MONUMENT NOS. 259 AND 258;
THENCE NORTH ALONG THE WEST LINE OF FORT LEWIS, ALSO BEING THE WEST LINE OF THE EAST HALF OF THE EAST HALF OF THE WEST HALF OF SAID SECTION 24, TO THE NORTHEAST CORNER OF THE WEST HALF OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SAID SECTION 24, BEING DESIGNATED AS FORT LEWIS MONUMENT NO, 256;
THENCE WEST ALONG THE SOUTH LINE OF FORT LEWIS, ALSO BEING THE SOUTH LINE OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF SAID SECTION 24, TO THE SOUTHWEST CORNER OF SAID NORTHEAST QUARTER OF THE NORTHWEST QUARTER, BEING DESIGNATED AS FORT LEWIS MONUMENT NO. 255;
THENCE NORTH ALONG THE WEST LINE OF FORT LEWIS, ALSO BEING THE WEST LINE OF SAID NORTHEAST QUARTER OF THE NORTHWEST QUARTER, TO THE NORTHWEST

CORNER OF SAID NORTHEAST QUARTER OF THE NORTHWEST QUARTER, BEING DESIGNATED AS FORT LEWIS MONUMENT NO. 254;
THENCE WEST ALONG THE SOUTH LINE OF FORT LEWIS, ALSO BEING THE NORTH LINE OF SECTION 24 AND 23, TO THE NORTH QUARTER-CORNER OF SECTION 23, BEING DESIGNATED AS FORT LEWIS MONUMENT NO. 251;
THENCE NORTH ALONG WEST LINE OF FORT LEWIS, ALSO BEING THE NORTH-SOUTH CENTER LINE OF SAID SECTION 14, TO INTERSECT THE SHORELINE OF PUGET SOUND;
THENCE SOUTHWESTERLY ALONG SAID SHORELINE TO INTERSECT THE EAST LINE OF SAID SECTION 15 AND THE TRUE POINT OF BEGINNING.

PARCEL II:

THAT PORTION OF SECTION 35, TOWNSHIP 19 NORTH, RANGE 1 EAST, W.M., IN PIERCE COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE NORTH LINE OF THE SOUTH HALF OF THE NORTH HALF OF SAID SECTION 35 AND THE WEST LINE OF PARCEL 4-U.S., AS DESCRIBED IN QUIT CLAIM DEED RECORDED UNDER RECORDING NO. 8401170059, BEING THE TRUE POINT OF BEGINNING;
THENCE SOUTH ALONG SAID WEST LINE TO INTERSECT THE NORTH LINE OF THE

Appendix Y

BURLINGTON NORTHERN RAILROAD RIGHT OF WAY;
THENCE NORTHEASTERLY ALONG SAID NORTH LINE OF RAILROAD RIGHT OF WAY TO INTERSECT THE EAST LINE OF SAID SECTION 35;
THENCE NORTH ALONG SAID EAST LINE TO INTERSECT THE NORTH LINE OF SAID SOUTH HALF OF THE NORTH HALF; THENCE ALONG SAID NORTH LINE OF THE SOUTH HALF OF THE NORTH HALF TO THE TRUE POINT OF BEGINNING.

Appendix Y

FINDINGS AND DECISION OF THE REGIONAL COMMITTEE SERVING THE PUGET SOUND EDUCATIONAL SERVICE DISTRICT SERVICE AREA

CONCERNING PETITION TO TRANSFER TERRITORY FROM THE CLOVER PARK SCHOOL DISTRICT NO. 400 TO THE STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1, BOTH LOCATED IN PIERCE COUNTY, WASHINGTON

DETERMINING AN EQUITABLE ADJUSTMENT OF ASSETS AND LIABILITIES

FINDINGS

The Regional Committee for the Puget Sound Educational Service District service area, based on the approval of the transfer of the territory described in Attachment A from the Clover Park School District No. 400 to the Steilacoom Historical School District No. 1, said approval being documented in Attachment B, finds that it has considered the following in determining an equitable adjustment of assets and liabilities:

1. The number of school-age children residing in each school district and in each part of a district involved or affected by the proposed change in school district organization.
2. The assessed valuation of the property located in each school district and in each part of a district involved or affected by the proposed change in school district organization.
3. The purpose for which the bonded indebtedness of any school district involved or affected by the proposed change was incurred.

Appendix Y

4. The history and relationship of the property affected to the students and communities affected by the proposed change in school district organization.
5. Additional burdens to the districts affected by the proposed change in school district organization as a result of the proposed organization.
6. The value, location, and disposition of all improvements located in the school districts involved or affected by the proposed change in school district organization.
7. The consideration of all other sources of funding.
8. Any other factors that, in the judgment of the school districts or regional committee, were important or essential to the making of an equitable adjustment of assets and liabilities.

DECISION

The territory described in Attachment A shall be relieved of its proportionate share of the excess tax levies authorized under RCW 84.52.053 for the Clover Park School District No. 400, Pierce County, Washington, effective with those levies assessed for the calendar year 2010.

The territory described in Attachment A shall be subject to its proportionate share of the excess tax levies authorized under RCW 84.52.053 for the Steilacoom Historical School District No. 1, Pierce County, Washington, effective with those levies assessed for the calendar year 2010.

Signed /s/

Susan Nelson, Chair

Date: 3/25/04

APPENDIX Z – TRANSCRIPT OF MARCH 3, 2004 PUBLIC HEARING

PUGET SOUND EDUCATIONAL SERVICE DISTRICT

REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION

CLOVER PARK TO STEILACOOM TRANSFER

PUBLIC HEARING

Puget Sound Educational

Service District

400 Southwest 152nd Street

Burien, Washington 98166

March 3, 2004

BYERS & ANDERSON, INC. – COURT REPORTERS & VIDEO

Appendix Y

Appendix Y

Appendix Y

1 (800) 649-2034

scheduling@byersanderson.com

Appendix Z

APPEARANCES

REGIONAL COMMITTEE MEMBERS PRESENT:

Susan Nelson
Tim Hatley
Dan Rollins
John Lynn
Laurie Koehler
Thom Dramer, consultant

PANEL PRESENT:

Jane Murray
Carter Bagg
Harvey Erickson
Monte Bridges
Anne Shaw

Appendix Z

BE IT REMEMBERED that on Wednesday, March 3, 2004, at 400 Southwest 152nd Street, Burien, Washington, at 5:59 p.m., before Eva P. Jankovits, CCR, Notary Public in and for the State of Washington, the following proceedings were had, to wit:

<<<<<< >>>>>>

PROCEEDINGS

MS. NELSON: I'd like to call this meeting to order. I'm Sue Nelson, chairman of the committee. And at this time, I'd like to introduce the people, both committee members and staff, starting over there with Jane Murray who just got up. She's the one that many of you have dealt with. She's the assistant fiscal officer for financial services.

And next at the other table is Dr. Thom Dramer who's the regional committee consultant. And then Carter Bagg who is the regional coordinator for the Northwest Region for OSPI.

And then committee members Laurie Koehler, John Lynn, Tim Hatley, Dan Rollins. And then we have Harvey Erickson who is the assistant superintendent for financial services; Monte Bridges, the superintendent of Puget Sound ESD; and Anne Shaw who's the -- representing the attorney general's office.

The purpose of -- oh, excuse me. And the district representatives, I think, in the audience, we have Dr. Doris McEwen Walker from -- the superintendent of Clover Park; and Dr. Art Himmler, the superintendent of Steilacoom. Thank you all very much for attending.

Appendix Z

And the purpose of this public meeting is for the regional committee members to discuss and decide on an equitable distribution of assets and liabilities and bonded indebtedness and special levies as a result of a transfer of territory from the Clover Park School District to the Steilacoom Historical School District.

I think everyone in the audience who is interested has a copy of the adjustments of assets and liabilities. Many of you picked it up at the subcommittee meeting a few weeks ago. And all of the committee members, of course, have a copy of it.

We also all received a copy of two pieces of information. Each district sent out something in -- new information or other information they wanted us -- and we decided that -- it was distributed to all of us. We've all had it, well, quite a while, a week or so. And I know all -- I'm correct that all the members have read this information both -- from the two districts. So we have that information in front of us.

So we will be going to discuss this among ourselves, and then we will take a vote on how we wish to proceed.

MR. HATLEY: Madam Chair?

MS. NELSON: Yes.

MR. HATLEY: I'm wondering -- we did get this information from the two school districts, and I'm wondering if we want to provide them with a few minutes of time to, maybe, go over the -- their memos with us, maybe a couple, two, three minutes, and -- so that they can feel

confident that we've had the opportunity to hear where they're coming from on their -- on their statements.

MS. NELSON: Is the committee in agreement that we would be prepared to give them a few minutes to do this?

MS. KOEHLER: Fine with me.

MS. NELSON: Okay.

Anne?

MS. SHAW: If I can interrupt for --

MS. NELSON: Sure, please.

MS. SHAW: -- just a moment. I don't believe the committee has some information, apparently, that was passed on to Jane, I believe, yesterday --

MS. MURRAY: (Nods head.)

MS. SHAW: -- from the Steilacoom School District with respect to some -- and I'm not clear on this at all -- in terms of they want to change the boundary positions from what had originally been described in the petition. And I'm not quite sure how this is -- how this has come about, whether we're dealing with a typographical error or whether we're dealing with substantial pieces of property. I don't know what this is because it's just got a difference in the legal description.

I guess what I would like to have some clarification on is, this committee is aware of the fact and -- for those of you who are not aware -- it can only decide the petition that

is before it. It does not have the ability nor the authority to change or amend a petition that's before it.

So the petition that is before it at this point, as I understand it, is at least legally different from what's being proposed in here. (Indicating.) And without some agreement by both parties, this committee cannot act on this amendment or informal -- I'm not even sure what it's being called, but the committee cannot act on this without an agreement from both parties.

So I don't know if -- if the parties want to sit and talk about this for a minute, or if there's been some discussion, or -- or whatever, but to the extent that any change is going to be made at any petition, it won't happen here without the agreement of both parties.

MS. NELSON: I might ask the question of Steilacoom: Is Clover Park aware of this information? Have you given it to them?

MR. HIRST: Chris Hirst. The information was provided by our office. I've not shared it with other counsel. What it is -- if -- you may remember in the first proceeding, the first night, there was an issue raised about whether the legal description was accurate for the property that is being sought for transfer. Clover Park raised an issue that the legal description included some federal property. This is an attempt to correct the legal description for the petition. Okay?

Happy to talk to them about it now, after the hearing, whatever you want. I submitted it to Dr. Bridges' office today or yesterday, one of my colleagues did.

MS. MURRAY: Yesterday, yeah.

MS. NELSON: What now?

MS. SHAW: Well, if you want to just proceed the way we are -- like, keep going. I just want to make the committee aware of it. Maybe when we take a break, the parties want to talk about it or not, as you choose, but we'll have to act on it one way or another if, in fact -- if something is being requested of this committee, it may have to be acted on one way or another. Just for your information.

MR. HATLEY: Question.

MS. SHAW: If you want to proceed the way you're proceeding --

MR. HATLEY: Just a question. Does the -- does it change the map itself, or is it just the legal description that would follow the boundaries on the map?

MR. HIRST: It's my understanding that the maps that were presented to the parties at the time of the original hearing both agreed on what property was being sought for transfer. The legal description was the inaccurate part. And I believe that I committed to you to submit, at that time, as soon as we could get it out of our legal description surveyor people and correct the legal description.

MS. NELSON: Does Clover Park have an answer to that at this point? I mean --

MR. HOGE: Yes. I'm Mike Hoge, representing Clover Park. And we were just passed, by Ms. Murray, what appears to be an e-mail cover sheet for

whatever revised legal description people are talking about. We've not seen that and --

MS. SHAW: The committee hasn't seen it either.

MR. HOGE: Okay. Well, it's pretty hard

MS. NELSON: Thank you. I assume then, Anne, that we need to just proceed, and that particular issue would, obviously, be decided --

MS. SHAW: Mm-hm.

MS. NELSON: -- at another time, probably not by us.

MS. SHAW: And to the -- to the extent that -- when we take a break, I'll be happy to provide you what was provided to me in terms of a description, just for your information, pass the information on.

Okay. I would proceed.

MS. NELSON: Okay. So we have agreed that we will give each district, say, up to five minutes if they wish to state their case. They're also -- the committee may choose to question you. Other than this, there will be no other statements.

Is there someone who would keep time since my watch doesn't have a second hand.

MS. MURRAY: I'll do it.

MS. NELSON: Okay. Would Steilacoom like to go ahead, and do you have anything you wish to add at this time?

MR. HIRST: I'm happy to summarize what I submitted to you in --

MS. NELSON: Certainly.'

MR. HIRST: -- way of -- in way of a --

MS. NELSON: I don't have a -- well, we don't -- unless you need a podium, I think it's fine from right there. Whatever --

MS. SHAW: If you want to use the end of the desk, we can --

MS. NELSON: Whatever is convenient.

MS. MURRAY: There's --

MR. HIRST: This is fine.

MS. MURRAY: We got a podium right there if we want to pull that over, if you'd like. Right over here.

MR. HIRST: Okay.

MS. MURRAY: Okay?

MR. HIRST: If you've had a chance to look at our supplemental submission, we tried to address the issue that you have listed on your agenda for this evening as being before you for consideration; that is, the adjustment of assets and liabilities as opposed to Clover Park's submission which

really tried to reargue the case and raise new issues for the first time concerning constitutional questions which, if you have any questions about the constitutional issues that Clover Park raised, I have a one-page supplemental submission of actual legal argument with authority that tells you that that argument is simply baloney.

The -- the points that we raise, though, in our supplemental submission are ones that we hope you will consider in terms of the adjustment of the assets and liabilities.

We understand that the recommendation of the subcommittee is to delay the -- the actual effective date of this transfer to 2010. If that recommendation is motivated by what we heard in the subcommittee's deliberation over this, and that is, concern about the potential impacts on Clover Park, specifically mention Clover Park's ability to pass levy propositions, we have proposed to Clover Park, and proposed to you for your consideration, transferring the property now but making it subject to the levy propositions as well as bond propositions that might be passed for a stated period of time and then -- or making the effective date of the transfer a period of time down the road -- we proposed to Clover Park, for example, six months -- so that the -- any recently passed levy proposition would be in existence and would be subject -- to the property would be subject to it.

We believe that's more appropriate for these reasons: As you've heard in all of the presentations and a lot of material about what is right or wrong for the students of this particular area, but what was not disputed is that the citizens who live in this area, including the ones who live in, currently, Clover Park, all want to be part of Steilacoom School District. And there's a petition that's before you that

says a very overwhelming majority of that population wants this to happen.

If you delay till 2010, those students will not have an opportunity, a right, to attend, as a matter of right, in Steilacoom School District because they won't be residents of Steilacoom School District.

On the other hand, if you transfer the property now but make it subject to the assets and liabilities issues that you have talked about, namely, make it subject to the levies that Clover Park might resubmit and pass within the next few months, as an example, then those people would have the right to attend schools in the Steilacoom School District. And it would also enhance Steilacoom's ability to pass a bond issue, perhaps levy propositions as well, but bond issue to build the schools on these parcels that you've heard about during these proceedings. If it's delayed, neither one of those are facilitated.

And so I believe that the delay till 2010 is unnecessarily harsh for Steilacoom, and that's the major point that we make for you in our presentation and our supplemental materials.

We hope you will think about that and instead make the property subject to both levy proposition and bond proposition but transfer the property now.

Thank you very much.

MS. NELSON: Thank you. And --

MR. HIRST: Oh, I'm sorry. I've been -- I'm also asked to advise you that this board had passed a bond or

a proposition or resolution to present a bond to build new schools in the area in the normal course of their proceedings since we were together last, and they plan to do that and want to do that.

Thank you.

MS. NELSON: Thank you.

For Clover Park?

MR. HOGE: Mike Hoge. Mr. Hirst suggested that the procedure of our submitting a letter as well as its substance were wrong. I'd like to point out that this hearing is still ongoing. According to the statute, in fact, if it weren't still ongoing, the committee would be late in rendering its final decision. In other words, the hearing didn't close in November; it is still ongoing.

And the committee's operating procedures, also readily available on the Web site, do say that the committee can postpone action on any item when, in their opinion, additional facts or clarification may enhance a decision. I don't want to overstate it, but I think it's important that the committee hear not only Steilacoom's legal views about the matter, and certainly, there were a lot of absolute assertions made about that in November but also Clover Park's.

And I'm concerned that the committee got the impression in November that the law requires that the committee approve the proposal. The law does not require the committee to approve the transfer. The law requires the committee to deny the transfer.

Appendix Z

As I said a few moments ago, the statutory process begins with the school boards adopting a resolution describing the property proposed for transfer and stating the reasons for the proposal. Steilacoom's resolution did not do this, so the whole process to this time has been invalid in relation to that fundamental criterion.

It's nice to hear that Steilacoom has attempted to rectify that by sending something to the ESD or the regional committee yesterday and not informing us, but I don't think that's going to be sufficient; but even starting over with an accurate property description will not save Steilacoom's intended proposal because it is inconsistent with both our statutes and our constitution.

It would increase the existing disparity and per-people valuation for both general fund and capital purposes. And both are important because passing M&O levies is critical to offering a decent educational program the way school funding is in the state of Washington right now. And passing capital levies and bond issues is critical to maintaining adequate school facilities. So a proposal that increases that disparity instead of improves it is flawed as a fundamental matter.

The proposal would also tend to divide rather than bring together students by both racial and socioeconomic background. And although Mr. Hirst has stated a different view, I can assure you that those constitutional arguments have a great deal of substance and history in the state of Washington as well as school funding decisions from other states.

Appendix Z

It's also important, I think, that the planned community example subcriterion that was given such promise during the process doesn't really support the result.

First of all, there was an overemphasis on that one criterion, just looking at the checklist and the questions that were asked and the like as well as the testimony, but even if -- even if those problems didn't exist, this is not a planned community. This is an area -- and there's a plan that there will be a community, but the community is not fully planned. So just using words in their ordinary sense, the community is not planned. It is still in planning. So I don't think that that example subcriterion really helps Steilacoom either.

For those reasons as well as the ones discussed in more detail in our letter to you of last week, we believe it would be a legal mistake for the regional committee to finally approve the Steilacoom proposal even if that was the committee's initial, seemingly somewhat uncomfortable, tentative conclusion on November 25th.

We do recognize and appreciate the good reasons for delaying the financial impact of the proposal until 2010 as recommended by the subcommittee, but we suggest that the stated reasons for that recommendation, namely, to delay the major harm from Clover Park -- to Clover Park from the proposal are really a product of the problems of the proposed transfer itself.

The gut feeling that was voiced by members of the committee that there's something wrong with this idea was a correct and fair perception. So we just want to make sure the committee is aware. Our view is that the law does not permit the proposal even if one accepts the attempted amendment to be approved, rather the law requires that it be denied.

Thank you.

MS. NELSON: Thank you very much.

At this time, before we continue, are there any questions just on their testimony?

I have got -- oh, I'm sorry.

MR. DRAMER: Just a comment to maybe clarify. It's my understanding that the law does not require the committee to deny or pass on any proposal. What the law requires is that the committee consider. And I would think -- just to put some balance to it -- it's up to the committee to determine from their best judgment.

So the law -- it's my understanding -- does not require matters of evidence to say it should be denied or should be approved. It requires the committee to consider these things.

MS. NELSON: All of the factors, you mean.

MR. DRAMER: Yes, but -- but does not require them -- that if there's so many this way or so many that way, so -- the law does not have a requirement for the committee to make a decision, thus we have a committee. So it's a judgement based on the committee's consideration.

MR. LYNN: Susan?

MS. NELSON: Yes.

MR. LYNN: The other thing I think we ought to note is that all of the committee members have not heard the three proposals that you have.

MS. NELSON: That's -- I'm negligent in that. I need to have Harvey present the three proposals, and I should have had him do it before.

MR. LYNN: Three of us have not heard any of it.

MS. NELSON: Right. So would you present the three proposals that you presented to Tim and I.

MR. ERICKSON: I'd be happy to, Madam Chair.

And the green sheets before you are the three proposals: Option A, B, and C. They're all laid out similarly, and I'll just, kind of, talk first about how the layout is, so you can follow along.

At the top, we have Clover Park and Steilacoom's assessed valuations. On the left-hand side is the "Debt Service Assessed Valuation," and on the right-hand side is the "Maintenance and Operations Assessed Valuation." And the reason both are shown is, in the event of timber-assessed valuation, you can have different numbers. Here the numbers are fairly similar.

Right below that we have a description of the actual option and the authority for the options. We then have some assumption statements. And the assumptions are the same for all of them. It's the -- the information presented here is the same as it was done during the public hearing.

The debt service levies are assumed to be equivalent to the existing debt service. The districts can actually adopt different debt service levies from the actual amount of debt

service, but we're just assuming it will be the exact same amount.

The assessed valuations in effect for 2003 levies are maintained. We didn't want to get into speculation on what possible road would be the assessed valuation, so we're just saying it's locked at one set value.

If I could start with Option C, work my way backwards to Option A.

Option C is the transfer of territory to take effect assuming its proportionate share of Steilacoom levies and relieve its proportionate share of Clover Park levies. This is the common option the regional committee uses; although, most of the transfers that we've heard in the recent past have been fairly small in size and assessed valuation. So this one may not be appropriate, that staff recommended at the time of subcommittee that this one probably isn't appropriate to address the committee's concerns on impacts on Clover Park; but you can see down below here on the effect on Clover Park levies, we have that impact on remaining taxpayers that it would have an adverse impact for the debt service. For the impact on Steilacoom levies, they'd have a favorable impact to the current taxpayers.

M&O levies for Clover Park are unknown, so there's no known amount of impacts. And on the M&O levy, there's one existing levy that would be impacted which is the 2006, and there'd been a favorable impact to Steilacoom on that levy.

And so the pros of this is that the transfer of territory's immediately available to pay any new bonds to Steilacoom.

Appendix Z

Existing Steilacoom debt service levies and the 2006 M&O levy are beneficially impacted to Steilacoom taxpayers.

The cons are the future M&O levies for Clover Park are adversely impacted, and the existing Clover Park debt service levies are adversely impacted.

Moving to Option B. Option B is, transfer of the territory continues to pay its proportionate share of Clover Park levies to pay the debt service until it's paid off, and -- but the transfer takes place -- effective 9/1/04.

This is the -- in the past, it had been levies -- or the transfers where this option has been used, where the territory was considered to continue to pay on the debt service to the district that -- leaving for all the bonds that have been passed up to the point of transfer and would pick up its share of the new bonds, if any, that the district that received the territory would vote after the point of transfer.

The assumptions are all the same here that -- here the effect on Clover Park levy is: There is none. The Clover Park debt service levies would continue to be paid to the proportionate share of the property, so no impact. Again, the unknown impact on M&0 levies.

Steilacoom levies, debt service levies, they would get no benefit from the existing debt service because it would be relieved of that. It would only be new debt service until the point of time of the Clover Park bonds being paid off. And the M&O levy for 2006, they would get a beneficial impact on that.

The pros on this one was there's no adverse impact in the Clover Park debt service levies. The transfer of the

territory is available for assessment for new bonds in Steilacoom. It's a beneficial impact to Steilacoom levies effective with the 2006 levy.

The cons are future Clover Park M&O levies are adversely impacted assuming there are some levies. And there's no beneficial impact to Steilacoom debt service levies.

Option A is -- the option is, a transfer of territory would actually be delayed until January 1, 2010. This option has not been used to our knowledge at any time in the previous district.

The impact here on Clover Park levies would be no impact to the debt service levies. The property would still be in Clover Park until those levies are paid off. There's an unknown impact on future levies, M&O levies, for Clover Park. If any are passed, it would be in this time frame. This territory's still considered to pay its proportionate share.

On the Steilacoom debt service levies, there would be no -- current impact, would be no relief on that because the territory would still be in the Clover Park School District. And there'd be no impact on the 2006 M&O levy for Steilacoom that begins still in Clover Park School District.

So the pros are the adverse impact in Clover Park is delayed, given time to adjustment. The cons is any beneficial impact to Steilacoom is delayed, and there's unknown impact of levies yet to be passed.

So those are the three options. Hopefully, at some point, is understandable. This course -- are there any questions on this?

MS. NELSON: Or comments.

MS. KOEHLER: So their M&O levies are through the 2005 if you're up for M&O again --

MS. NELSON: Which --

MR. ERICKSON: Clover Park is actually --

MS. KOEHLER: I don't care.

MR. ERICKSON: Clover Park actually has to have levies voted for 2005 and beyond, and Steilacoom is on the books through 2006.

MS. KOEHLER: Are they four-year levies? Four years or two?

UNIDENTIFIED SPEAKER: We're running a four year.

MS. NELSON: Four?

Other comments? Questions?

MR. ROLLINS: Did -- did staff ever look at whether there's statute authority to do what Steilacoom proposed in their original proposal to Clover Park about a graduated change?

MR. ERICKSON: Well, when we looked at what are the possibilities -- and we came up with this scenario, basically, because A and B had been proven, had been done. C is creative, so we can't really. say much about what can be done with it, but it seems to be within the abilities as spelled out for the regional committee to decide.

Appendix Z

We considered whether or not transfer of payments or payments of some sort could occur. There's no -- it's also -- nothing clear on that.

Going back and researching what had been done in the past, there was a case where an actual school building was transferred and teachers' contracts were actually transferred, but that was in an area where there was actually a school just -- building for the district that would -- is the territory -- in the territory.

There's nothing we could see in terms of any sort of cash settlement payments. So at that point, we figured, well, we'd stick to something that's more clear.

MS. NELSON: To correct you, it was Option A on here has not been done. B and C are the ones that have been done.

MR. ERICKSON: Right. I'm sorry.

MS. NELSON: Yeah.

MR. ERICKSON: I thought I said that.

MS. NELSON: Just for the --

MR. ERICKSON: I must have misspoke.

MS. NELSON: -- record. Yeah. I think most of us figured it out.

So I guess to answer the question, the actual thing -- the actual transfer of this way has not been done, but some others -- I won't say of a similar nature because that's not really true, but there have been some unusual circumstances.

MR. ERICKSON: Yeah. Going back through the archives, what I -- what I found was the -- the only time I found actual transfer of assets was where there was an existing school in the district that lost the territory within the boundary of the territory that was transferred. So then there's certainly a logical connection of how to deal with that. So I don't know -- and if legal advice would have something on whether or not you have the ability to set forth some sort of payments, and I don't know what the collectibility and enforcement of those payments would be either.

MS. NELSON: Comments?

MR. HATLEY: Madam Chair, I'm wondering if perhaps it may be appropriate for us to explain what our recommendation is and, kind of, how we --

MS. NELSON: Sure.

MR. HATLEY: -- achieve that recommendation, and we can, kind of, tag team it.

As you recall when we reviewed the initial petition on the transfer of territory, we were -- it's a -- it's a --probably the most significant -- certainly as when I've been on the board, the most significant transfer of territory we've ever seen in terms of the scope of the amount of AV and the impacts that it will have on both school districts. And as we've seen through the records and through the testimony that we've had, it's been a fairly contentious issue for a number of years.

And the committee decided -- and I think it was unanimously -- to approve the transfer of territory, and we wanted to take a good hard look on -- we had concerns at that

time that -- that we thought, from a policy and legal perspective, the transfer was appropriate. And we want to take a good look at -- on -- on the transfer of liabilities because that was -- that was really the issue in terms -- in terms of the financial impacts to the school districts.

So a subcommittee met and -- and wanted to explore what are all the various options that we have available to us. And my recollection of our discussion, including counsel, is -- and in our meetings, were that we had a fairly broad range of latitude in terms of the distribution of assets. So, Dan, in your comments, in terms of taking a look at what Steilacoom had proposed, it seemed to us that was within the parameters of what could be -- could be done. And, in fact, again, the committee has a fair amount of flexibility in terms of what -- what a proposal would be and a -- and a decision on -- on distribution of those assets.

So we wanted to take a look at the various options that we've had, and as -- as Harvey stated, we, you know, looked at C which is, sort of, traditional of what we've done. And we've seen that a lot in the smaller, you know, transfers where it's 20 homes or 30 homes, and the AV in a large urban school district is very benign, and it's maybe five cents on a thousand or on a hundred thousand, and it hasn't been significant. So it's always -- we've always been pretty comfortable on that.

We saw this one as way beyond that as a -- as a recommendation. So then we took a look at B, transferring the territory now, and then allowing -- if my -- if I'm recalling correctly. I don't have all my notes, but I think the bonds are outstanding on the Clover Park School District through '09. And so we were, kind of, looking at that as a date where, you know, it seems that through the end of '09,

we need to make sure that those bonds are approved; they're going to go off the books at the end of that time; and that those who would have been in the territories that approved it should continue to pay those and -- and -- and if the transfer's going to be affected, not necessarily obligated to additional bonds.

The levy side of it, we -- we -- we've heard testimony that -- that Clover Park is in the process of moving through additional levies. And it seemed rational to us that because it was such a significant transfer in the -- in the financial impacts to Clover Park, to help bridge on a transition period that it would be appropriate to allow them to levy through the life of the bonds, the M&O, to going along with those bonds; but at the end of '09, then the whole -- the whole territory would transfer, and everything would be complete at that.

So we, kind of, looked at it from a financial impact of: Let's just keep all those numbers together. Keep it whole. Let the Clover Park School District find a financial transition process so that they have time, a few years, to figure out how they're going to deal with that financial impact to the school district, give certainty to Steilacoom in terms of when they can anticipate those parcels being on their tax roles, and that both school districts then have that certainty to plan in the future. So that's why we came -- that's how we came up with, sort of, Option A.

Certainly, it's was -- it's one that we've never recommended before. We feel very confident, from our legal advice, that it's certainly appropriate. Certainly, the Steilacoom statements didn't leave me -- as I read through them, in any way suggest that it wasn't anything within our purview to do. And we thought that that would be, given the magnitude of this proposal, the fairest distribution of assets

between the -- between the two school districts in this very contentious and long-running issue.

MS. NELSON: I would just have to, pretty much, agree with Tim. I was looking at it very much to lessen the damage to Clover Park because it wasn't just the loss of the territory. It was -- it was the assessed value and the fact that I knew what it would do in presenting a bond or a levy. And that definitely presents a huge problem to tell your patrons that. And I thought, when you can say, Yeah, this is happening, but we've got this many years to prepare for it, that I, you know, it just seems so much easier and so much better for each district.

Now, I'm fully aware that the patrons of the Steilacoom School District whose children are affected by this will not be pleased by this, but that is -- that is not something we can control. And we just felt it was -- when we came to the meeting, both Tim and I had not seen any of these, so we had no idea.

We asked them to come up with some creative solutions and something -- and I found it -- it just, sort of, was an answer that I was, kind of, looking for.

And I can really add nothing more to that, but Tim and I both looked at each other and said, This would work.

MR. BRIDGES: And to be very clear to the rest of the committee too: Option A is and was the staff recommendation.

MS. NELSON: But it -- it wouldn't have mattered if it wasn't unless you had told us that it probably would not fly, and we felt it would.

Appendix Z

MS. KOEHLER: Well, I have a question. I just want to get this clear. In this suggestion, I guess, having to do with the future, let's say in 2006 or '7, whenever this next M&O levy comes out, and Clover Park does pass an M&O as every district in the state has an M&O levy, so they have to pass it. And our state requires a 60 percent majority of -- you know, to pass a levy.

Would this territory that we are going to transfer in 2010, in 2006, when they have to vote their M&O levy, are those -- you know, that group that's being transferred, where do they vote? Do they not vote at all? Are they going to be counted against them because of the last election? I mean, that's where I'm having a hard time understanding.

MR. ERICKSON: Well, they'll still be --

MS. KOEHLER: Does that --

MR. ERICKSON: -- in Clover Park --

MS. KOEHLER: Do you understand what I'm saying?

MR. ERICKSON: -- so they would still vote.

MS. KOEHLER: But they will still vote, but yet even if it'll go beyond the 2010, let's say, so then what happens? I mean, I thought that that's what we were looking at in 2010 to be the debt service, but that still has M&O.

MR. ERICKSON: Well, we talked about --

MS. KOEHLER: But they --

MR. ERICKSON: -- say, the bond issue, let's say what happens if Clover Park passes a bond or presents the voters a bond issue between now and 2010, and the way we thought it through was because the transfer, as it occurred, basically, on a set date, it would be the --Clover Park's responsibility to show that forth on its bond resolution, on the estimated tax rates, and so forth, taking effect that this territory's only part of it until 2010 so that they would be able to still present a bond issue but not be able to count on that this territory would exist in their district past 2010.

MS. KOEHLER: So they -- you're talking about the district. So you really, really are considering --

MR. ERICKSON: It would be the same sort of thing --

MS. KOEHLER: -- the M&O levy.

MR. ERICKSON: Well, it would be the same sort of thing on an M&O levy.

MS. KOEHLER: Right.

MR. ERICKSON: They are required to do an estimate of an impact on taxpayers and the tax rate and would use the assessed valuation of this territory for that time frame up to 2010.

MR. HATLEY: And as I recall, the bulk of this, if not all -- and I could be wrong on this -- but it's mostly commercial properties, so the number of actual voters in that area are few, if any. And that what or some, but that -- the levy -- you couldn't -- the school district couldn't levy property on -- that's outside of their school boundary, so

when the transfer occurred, even -- they couldn't -- they wouldn't have the ability to levy on that transferred property because we would have effected the date that, you know, transfer can actually occur. So it would be a done deal, and they just wouldn't be able to tax that anymore. And that was the -- the objective.

MR. ERICKSON: The idea on it being out so far -- let's say a -- say an M&O levy was going to cross this two years before 2009 and two years after. I don't know if that makes any sense, but let's dust say it does. And let's say that Clover Park's now raising a million dollars and wants a set tax rate. So they've had the million dollars for those first two years, but then they're going to lose a chunk in assessed valuation. If they want to keep the same tax rate, they'd put on their ballot 900,000 or something. They'd reduce the amount of the levy.

So they could still meet whatever tax rate they're trying to do with the voters, but have a plan in place --

MS. KOEHLER: Okay.

MR. ERICKSON: -- because they knew of the transfers.

MR. ROLLINS: But I see a problem trying to pass a levy like that because you got a whole lot -- I don't know how many people we're talking about -- but we have people that would be voting for something that they would no longer be part of part way through it. And they may -- they may vote no just because they know they're not going to be there anymore. They don't care.

I mean, you know, I -- I don't want to say that people will take that attitude, but it's certainly a possibility. And I can certainly see Clover Park's concerns for trying to pass a levy under -- under those voter conditions.

You've got a section of voters that aren't going to be there for the whole time period. And I see a potential headache for the county trying to run an election.

Say -- say there's going to be an election in 2009 for something to take effect in 2010, okay, which district do the people vote for? That -- I mean ... (Pause.)

MS. NELSON: The district they're in, in 2009.

MR. ROLLINS: But once it goes into effect, they won't be there.

MS. NELSON: Well, those things happen all the time when we transfer territory.

MR. ROLLINS: I know, but it's usually done --

MS. KOEHLER: Well, just not the magnitude of --

MR. ROLLINS: Yeah.

MS. KOEHLER: I mean, it's mainly not --it's the same thing. It's just not the same -- of the. numbers as what you had before.

MR. ERICKSON: Yeah.

Appendix Z

MS. KOEHLER: It is the same effect. The numbers seem huge, obviously huge. That's all, but if you're saying that most of this property ... (Pause.) So, I mean, that is mostly commercial then the voters numbers would be --

MS. NELSON: Well, the number of voters will increase as it's being built.

MR. HATLEY: Yeah.

MS. NELSON: Any comments, John?

MR. LYNN: Oh, I'm just putting some thought. It seems like it's, kind of, like being diagnosed with something, and you're waiting seven years for the operation. It's just, you know -- I broke my foot in December and went to the doctor in February. It's sort of like that.

I just -- it just seems to me like we're stalling something and not gaining anything.

MR. ROLLINS: I have two problems with delaying till January 1st, 2010. First problem is that January 1st is in the middle of the school year. School's already started for that year, and I don't think that's a good idea at all. And the second is delaying that long for the kids that are there now.

I know we're looking at dollars and cents right now, but I'm still trying to remember the primary purpose is for the education of the children. And I -- I am not comfortable at all with delaying that amount of time for that reason.

I'm -- even though I know that there's a -- there's a minor impact at the very beginning here. It's the only place

we don't have all zeros, but I'm -- I'm much more comfortable with Option B than A.

Like John says, we're delaying -- delaying something we know is going to happen. Option B gives you just about the same identical monetary condition, but it doesn't affect the kids, and that's what concerns me.

MS. NELSON: I'd like to say: When you talk about not affecting the kids but doing it sooner, you are affecting the children in the Clover Park District to a greater degree, and that's a heck of a lot more kids.

And, you know, we keep saying it's always for the kids, but the kids in the Clover Park District are being very much adversely affected by this transfer because they're losing assets. And everyone says, you know, "We're in it for the kids" -- I mean the people that speak. We -- you know, when parents speak -- "Don't look at the dollars and cents," but dollars and cents drive everything.

And I think that's the way I look at it; in that, if it's going to be transferred, I would like to lessen the impact in any possible way. And if that's the way to do it, I'm very willing to do it.

MR. HATLEY: And to add on to that, I mean, B, the concerns I have with that is -- even as I'm looking at my notes -- I have that there are currently no kids in the transfer territory.

MS. NELSON: Let's clear that up.

MR. HATLEY: Can we get that --

Appendix Z

MS. NELSON: We've had that. Okay. Dr. Himmler, can you give a rough estimate, or Clover Park both, as to roughly how many children are in the territory, whether they're -- no matter what district they're going to.

DR. HIMMLER: I'll have to do this jointly with you.

Are you talking about the current date now?

MS. NELSON: Yeah. I mean, we had these figures, and we just don't have the count.

DR. HIMMLER: I'll try to find the number for you.

MR. COHEN: As far as we know, if there are any, it's very few. It's anticipated that the number will grow over time, but they're -- they're very, very few now.

MS. NELSON: Yeah. We've -- we've heard of a few, and they can't get into Clover Park even though they live close by because there's no room and so forth, but they should be going there; but there is a drive in the area. I mean, there's just lots of land that houses are going to be -- and apartments that are going to be built. don't know when. Depends on the time.

MR. HATLEY: Looking at my notes from the testimony, I have -- I have -- there are currently no kids and the potential for 230.

DR. HIMMLER: There are some --

MR. HIRST: You may --

DR. HIMMLER: -- yes.

MR. HIRST: -- recall that you had a current resident of the transfer --

MS. NELSON: Yeah.

MR. HATLEY: Okay.

MR. HIRST: -- testify about his daughter having to go to school on the base.

MS. NELSON: Right. And he didn't like it.

MR. HIRST: That's right. So there's at least one, and I want to see --

MR. HATLEY: Okay.

MR. HIRST: -- if we have --

MR. HATLEY: Okay. Okay.

MR. COHEN: Our best guess would be 25 to 50 right now.

MR. HIRST: And that is consistent with my recollection.

MR. HATLEY: Okay.

MS. NELSON: Okay.

MR. HATLEY: Okay. That's good.

I think the issue is that, currently, Clover Park has failed on their M&O levy this last time; is that correct?

MR. HOGE: That's right.

DR. WALKER: Yes, that's correct.

MR. HATLEY: Your most recent M&O levy in February went down.

DR. WALKER: Yes.

MR. HATLEY: And so currently, you have no M&O left.

MR. HOGE: Except for the one that was passed in 2000.

DR. WALKER: That's correct.

MR. HATLEY: Okay.

DR. WALKER: Upcoming, we don't have one.

MR. HATLEY: Correct.

And if we transferred the territory now, you couldn't put those -- that property on your levy to come up. And the impact of that would be significant in terms of the increase in what the levy would be.

Is that --

UNIDENTIFIED SPEAKER: That's correct.

MR. HATLEY: And so what -- so, to me, that's the issue right there, is that Clover Park has to totally fundamentally change how they're go to finance their school

district, I think, which has a huge impact. And that was our concern.

And so we thought, by giving them the property that that could keep on the tax roles for 2009 would be the best we could do in terms of keeping them financially whole.

MS. KOEHLER: I mean -- and if you're worried about January, then do it in September.

MR. HATLEY: Right.

MS. KOEHLER: I mean, that's -- that's --

(Simultaneous discussion.)

MS. KOEHLER: I mean, that's -- you know, do it at the school year instead of the annual. I mean, that's just a matter --

MS. NELSON: You know, Harvey, on this January 1st date, was that just a date because of what we talked about?

I mean, often we said on -- where did I see another date on one of these? You know, we've -- we've used various dates, but start of the school year or -- yeah, on -- on B, it says 9/1/04, I mean.

MR. ERICKSON: Right. And I think, traditionally, transfers start at the school year. Really, the only reason for the January 1 just -- is tax year.

MR. HATLEY: Probably easier.

MR. LYNN: Does that have something to do with the latest that you can -- school board can --

MS. NELSON: Yeah. That it can be approved to go in --

MR. LYNN: A resolution to go ahead with an M&O. And then the earliest you can vote on is, like, the --

MR. ERICKSON: I think it's more --

MR. LYNN: -- February or something like that.

MR. ERIKSON: -- the tax year.

MS. NELSON: Yeah. I'm sure it's the tax year.

MR. LYNN: I think maybe that's why that's on there.

MS. NELSON: But it doesn't have to be, right?

MR. ERICKSON: No, you can --

MS. NELSON: No. I mean, you can put it -- put it to be the ninth of this 9/1 --

MR. LYNN: Yeah.

MS. NELSON: -- or 10 or whatever through the school year.

MR. DRAMER: Yeah. And know that --

Appendix Z

MS. NELSON: Thom?

MR. DRAMER: -- school districts are paying bills 12 months out of the year, and school districts -- I mean, there's -- so there's revenue that comes in; there's bill being paid; and other -- there's something to be said for schools opening in September, theoretically closing in June, but the tax revenues come in at different times. The bills are paid. You've got payroll to meet, so the opening of school may have less significance than how long choosing to allow Clover Park to have the asset to run the schools.

MR. LYNN: The school budget year runs from September 1 through August 31.

MR. DRAMER: Yeah.

MR. ROLLINS: Again, I'm thinking back to enrollment. If it starts at the start of the school year, and I mean, it's starting January 1st, for all practical purposes, those kids are going to stay put where they're at --

MR. DRAMER: Right.

MR. ROLLINS: -- until the following year, which would be longer. That's why I was -- wasn't real happy seeing January 1st there.

MR. ERICKSON: Well, the other thing that comes into play in this, too, is that March 1st -- the transfer has to be to the county before March 1st with any tax role for the next year.

So, really, in theory, if I've got my numbers right, you could set a September 1st, 2008, which the county would get before March 1st of 2009 which would impact the 2010 levy.

MS. NELSON: Now, wait. March 1st, 2008? So that -- you're taking --

MR. ERICKSON: No, September 1st. I'm sorry.

MS. NELSON: Oh, okay.

MR. ERICKSON: September 1st.

So the school year that begins 2008, the transfer would get to the county before March 1st of 2009 which means it's available for the 2010 levy.

MS. NELSON: I'm not --

MR. LYNN: You lost us.

MS. NELSON: -- understanding that.

MR. ERICKSON: If you make this transfer on January 1st, 2010, it can't impact the 2010 levy. Thinking this through, it's going to impact the 2011 levies.

MS. NELSON: Well, what if we put it --well, we keep talking about the school year. Say, we said September 1st, but then it has to -- if we said September 1st, could the kids transfer for that school year? You know, if we said September 1st, 2009, you know, that --we're talking the same school year, just from January back to September.

Could -- could the children transfer then?

MR. ERICKSON: Right. Well, once -- if the -- once the transfer's occurred, not only the children can transfer but any elections would be --

MS. NELSON: Well, then it would go to the county by the next March of 2010.

MR. ERICKSON: Right.

MS. NELSON: Same as if we did in January.

MS. KOEHLER: And it wouldn't go into effect until the 11th --

MR. ERICKSON: Two thousand -

MS. KOEHLER: -- 2011, is what he's saying.

MS. NELSON: Okay. Okay. I understand that now.

MS. KOEHLER: Yeah.

MR. ROLLINS: So are you saying that we could -- we could make it September 2008 --

MR. ERICKSON: Yeah. If I've got --

MR. ROLLINS: -- and it wouldn't effect -- still wouldn't effect their levies until 2010? It would accomplish the same thing, but --

MR. ERICKSON: 2010 tax year.

MR. ROLLINS: -- but the kids would be able to transfer -- would be eligible to register, not transfer, using the wrong word there -- would be able to be register in Steilacoom for class in September 2008.

MS. NELSON: That doesn't make sense to me, taking a whole year off.

MR. ERICKSON: Well, but you have to follow through on the county's viewpoint. In the county, they've got to have the -- basically, the tax roles in place, and so they need, essentially, a year's lead.

And January 1, 2010, it's too late to impact those 2010 levies. It's going to be the 2011 levies. And they actually have that, I believe, in statute.

MR. HATLEY: So if it was effective September 2008, would levies levied in through '09 be effective on the transferred territory for Clover Park?

MR. ERICKSON: Right, because that would change the 2010 assessed valuation.

MR. HATLEY: So it would make it whole through '09. Okay.

MR. BAGG: Can I --

MS. NELSON: Oh.

MR. BAGG: I don't know if I can clarify this. The statute I think you're referring to, 28A.315.065(2), is, "Any boundary changes submitted to the county auditor after the fourth Monday in June of odd-numbered years docs not take effect until the following calendar year."

MR. ERICKSON: There's actually, though, another statute that the county has to deal with which is in the 84 section --

MR. DRAMER: Okay.

MR. ERICKSON: -- which has to do with when that set roles for changing taxing districts. And that's -- that's the date that always tell me that go by, is March 1st.

MS. NELSON: I still prefer the 2010 date, but --

MS. KOEHLER: But you'd buy into the 9/1/09 date.

MR. LYNN: '8.

MS. KOEHLER: '8 -- no.

MS. NELSON: I'd -- oh, I'd buy 9/1/09.

MS. KOEHLER: Yeah.

MS. NELSON: I'd hate to move it back to 9/1/08. I'd move it back -- so the kids could move in September rather than jumping in the new school that they were in January 1st which would probably keep them there the rest of the year.

MS. KOEHLER: Right. I get it.

MS. NELSON: All right. We'll entertain a question. Go ahead.

MR. HIRST: I could stay with the January date, and the youngsters can waiver in to Steilacoom.

MR. LYNN: But that's still waivering.

MS. NELSON: Well, we understand that, but we're also concerned of room -- how much room there is

because we understand that now is not -- you don't always have room, do you?

DR. HIMMLER: Just a comment. It may be out of line; just stop me. Our board just passed a proposition to a motion to have our capital bond levy in this coming February --

MS. NELSON: I heard that.

DR. HIMMLER: -- which would provide for the doubling of the size of Clover Park.

MS. NELSON: Clover Park. Well, that has been the plan all along, I understand, hasn't it, that that school was going to be --

DR. HIMMLER: Yes. So we're concerned --

MS. NELSON: -- made larger.

DR. HIMMLER: -- about when the date comes that we would actually tax.

MS. NELSON: So that could relieve some of our questions if we are concerned about letting the kids waiver in.

MR. BRIDGES: I just want to caution this conversation. We're -- we're presuming all kinds of communication.

MS. NELSON: Yeah, you're right.

MR. BRIDGES: And I think it's really important that we -- you know, we're going to have to make

a -- we're -- we're presuming decisions and availability, and we can't do that. So I think we've got to stick to ... (Pause.)

MS. NELSON: Well then, I think, the question would be: We need a motion on one of these options. And then if we wish to change something within the option, I believe. that is within our right to do so.

MR. HATLEY: Madam Chair, I'd like to make a motion to -- for the committee to go with Option A, where the transfer of the territory takes effect January 1st, 2010.

MS. NELSON: Is there a second to this motion?

MS. KOEHLER: I'll second it.

MS. NELSON: It's been moved and seconded to approve the transfer of territory to take effect on January 1st, 2010.

Question?

MR. ROLLINS: I'm -- I'm still -- I don't know if we got a complete -- or if we're absolutely certain. If -- if the children -- if the transfer goes into effect September 1st, 2008, and if it has -- if it doesn't effect any of these numbers through the end of 2009, I'm --I'm for -- I'm still for -- I realize we're still talking about amending the effective date. I'm still thinking that 2008; that one additional year -- and especially if it's --if it sounds like it makes absolutely no change in these numbers, if it's the same exact numbers we're looking at here, that September 1st,

2008, I really want to suggest the committee members consider that -- that as a changed date.

MS. NELSON: Other comments?

MR. LYNN: No, but I'll put that in the form of an amendment to the motion that we amend the date to September 1st, 2008.

MR. ROLLINS: I second the amendment.

MS. NELSON: Questions? We haven't -- we didn't vote on the first one.

(Simultaneous discussion.)

MS. KOEHLER: Then we were going to vote on the amendment, and then discuss the date because we had questions about the date.

MR. HATLEY: We've got the motion on the table.

MS. KOEHLER: Right. The motion's on the table.

MR. HATLEY: That can be -- that's up for amendment.

MR. LYNN: This was the first amendment.

MR. HATLEY: Yeah.

MS. NELSON: Okay. Questions on the amendment?

Appendix Z

MS. MURRAY: We've got an amendment to 2008, September --

MS. NELSON: 2008. What date in September?

(Simultaneous discussion.)

UNIDENTIFIED SPEAKER: September 1.

MR. MURRAY: September -- okay.

MS. NELSON: September 1st, 2008.

I -- without -- I can't say disregarding the figures --I feel like we're taking a whole year away. And I like this number of 2010 because it was -- it just was more time. And I'm not prepared, myself, to want to take a year away from what I thought was a pretty good alternative. I'd go back to September '09, but I won't go back to September '08.

Any other comments?

(No response.)

Okay. On the amendment, we need a vote, and the vote will be for the -- change the date to September of '08. Laurie?

MR. COHEN: May we ask a clarifying question, Madam Chair? I'm very sorry.

MS. NELSON: Yeah.

MR. COHEN: I'm concerned that it's --that maybe not everyone in the room is on the same wavelength.

Appendix Z

The amendment -- the proposed amendment is to transfer the property effective September 1, '08, but to allow Clover Park to continue collecting taxes from the subject property through '09, correct?

MS. NELSON: Yeah.

MS. KOEHLER: That's what Harvey says happens.

MR. COHEN: Right.

(Simultaneous discussion.)

MR. KOEHLER: That's what Harvey said happens. We're trusting Harvey on this.

MR. COHEN: I just wanted to make sure everybody understands.

MS. KOEHLER: That's what he claims, right Harvey? "Harvey says" ... (Pause.)

MS. NELSON: Okay. Laurie?

MR. HATLEY: Well, could I --

MS. NELSON: Oh.

MR. HATLEY: I'm just thinking through out loud the way this would work. I'm comfortable as long as the tax revenues are occurring to Clover Park through '09. I'm comfortable with that. The issue of students being able to transfer, based on testimony, because they want to go to Steilacoom School District, then we get to do that a year earlier. That seems reasonable to me.

Appendix Z

And then the only other issue -- question I – would -- would it be -- and I don't know if I even really care about this, but it's just a technical question -- in that intervening year, would Steilacoom have the opportunity to levy a tax on that portion of the transferred territory in that -- you know, so let's say that got in '08, and that ran -- I guess that could run something in '09 and wouldn't be effective till '10.

MR. ERICKSON: Right.

MR. HATLEY: Okay.

MS. NELSON: Yeah.

(Simultaneous discussion.)

MR. LYNN: So either way, that would have to be disclosed.

MR. HATLEY: Yeah, okay.

MR. ERICKSON: I think there's -- one other thing just to keep in mind, because, you know, these numbers are just a guide. There's all sorts of assumptions here. We don't know what the actual debt service levy is going to be. We've assumed that growth is frozen on assessed valuation. So you can't say really on the basis of these numbers. It's more philosophy.

MS. KOEHLER: Right.

MR. ROLLINS: Gotta start somewhere.

MR. ERICKSON: Yeah.

MS. NELSON: Okay.

MS. KOEHLER: Okay. I -- I vote yea.

MS. NELSON: And that's on the '08.

MS. KOEHLER: '8. That was on the table now, right?

MS. NELSON: Right.

MS. KOEHLER: Okay.

MS. NELSON: John?

MR. LYNN: Yes.

MS. NELSON: Tim?

MR. HATLEY: Yes.

MR. ROLLINS: Yes.

MS. NELSON: Still vote no. However, motion passed. So the amendment passed.

Is that the whole amendment, or now, do we now have -- we could vote on the motion --

MR. HATLEY: Yes.

MS. NELSON: -- itself then?

MR. HATLEY: Yes.

MS. NELSON: Okay. The motion is the transfer of territory is to take effect on September 1st, 2008.

MR. DRAMER: Using Option A.

MS. NELSON: Using Option A.

Are there any questions?

(No response.)

Okay. There already has been a second to that. So Laurie?

MS. KOEHLER: I vote yea.

MR. LYNN: Yea.

MR. HATLEY: Yea.

MR. ROLLINS: Yea.

MS. NELSON: Yea. Motion carried. Okay. Is there anything else on this issue that we need to do at this time?

MS. SHAW: I guess what I would just -- with respect to the -- to the -- to the difference in the boundary descriptions. You might ask both parties if they want to discuss it, or a decision's already made by Clover Park, so we can close it out, or let them talk for a few minutes.

MR. LYNN: Can we take a -- about seven minutes recess and allow them to do that?

MS. NELSON: Sure.

MR. HATLEY: Seven?

MS. SHAW: Well, we may not --

MS. NELSON: Will that affect --

MS. SHAW: It won't affect anything except the actual boundary that you're talking about if, in fact, Clover Park wants to agree with it. If they don't want to agree with it, you're dealing with exactly what the petition says.

MS. NELSON: Okay. Well, I -- I mean, we certainly can give them a chance to talk. And then if they chose not to agree, then that --

MS. SHAW: Then we're just dealing with the petition as it is.

MS. NELSON: As it stands.

MR. HATLEY: Could I just ask a question? How much off -- how off is the -- between the legal description before and after? I mean, is it a minor or is it --

MS. SHAW: I don't know.

MR. HATLEY: We don't know.

MS. NELSON: I don't think any of us know because none --

MR. HATLEY: Okay.

MS. NELSON: -- of us is a surveyor.

MR. COHEN: It's a pretty substantial area on Fort Lewis.

MR. DRAMER: How much would you guess; how many acres?

Appendix Z

MR. LYNN: Why don't we just adjourn and let them --

(Simultaneous discussion.)

MS. NELSON: We need to -- before you leave, Tim --

MR. HATLEY: Yeah.

MS. NELSON: Just a minute. We have future business.

MR. BRIDGES: I think we're taking a recess.

MS. KOEHLER: We're taking a little recess.

MS. NELSON: Okay. We're going to take a recess for about five to seven minutes.

(Recess from 7:02 p.m. to 7:09 p.m.)

PROCEEDINGS (Continuing)

MS. NELSON: Okay. I think we're all back, and I was told that the two districts did not agree on the language in the legal description of the transfer of territory, so that did not enter into our deliberations here tonight. So as far as we are concerned, this transfer of territory is finished for our work here tonight.

Are there any other comments from the committee?

Appendix Z

MR. LYNN: Aren't you gonna first -- further reports?

MS. NELSON: Yeah. Other business and future petitions coming up.

MR. HIRST: Thank you.

MR. ERICKSON: Do we need to mention we have the appeal of the Snoqualmie Valley/Lake Washington that's taking place, to the state forum, on March 18th in Olympia at --

MS. MURRAY: It would be a school district --

MR. ERICKSON: -- two o'clock.

MS. MURRAY: Yeah.

MS. NELSON: At two o'clock. Okay.

MR. ERICKSON: I don't know if --

MS. NELSON: I'll go down.

MR. ERICKSON: -- any committee member wants to be there.

MR. ROLLINS: I'll be on an airplane.

MS. NELSON: And what about Tacoma/University Place?

MR. BRIDGES: We don't have anything back from Tacoma at this point.

Appendix Z

MS. NELSON: So that's -- we have no idea.

MR. BRIDGES: Yes, we don't know.

MR. LYNN: Anything else pending?

MS. MURRAY: By the grace of God, no.

MS. NELSON: Okay. Is there a motion to adjourn.

MR. LYNN: I'll so move.

MS. KOEHLER: Second.

MS. NELSON: First and seconded this meeting be adjourned. All in favor?

THE PANEL: Aye.

MS. NELSON: Thank you very much.

(Proceedings adjourned at 7:10 p.m.)

Appendix Z

APPENDIX AA – TRANSCRIPT OF REGIONAL COMMITTEE'S NOVEMBER 25, 2003 PROCEEDING

PUGET SOUND EDUCATIONAL SERVICE DISTRICT

REGIONAL COMMITTEE

ON SCHOOL DISTRICT ORGANIZATION

PROPOSED TRANSFER FROM CLOVER PARK SCHOOL DISTRICT #400 TO STEILACOOM HISTORICAL SCHOOL DISTRICT #001

November 25, 2003
Fife, Washington

BYERS & ANDERSON, INC. – COURT REPORTERS & VIDEO

Appendix AA

COMMITTEE MEMBERS AND STAFF PRESENT

THOMAS DRAMER
ANNE SHAW
MONTE BRIDGES
PETE FRANCIS
JOHN LYNN
SUSAN NELSON
TIM HATLEY
PAT HINNEBERG
DAN ROLLINS
HARVEY ERICKSON
MICK MOORE
CARTER BAGG
JANE MURRAY

Appendix AA

BE IT REMEMBERED that on Tuesday, November 25, 2003, at 5802 - 20th Street East, Fife, Washington, at 6:01 p.m., before Judy Steenbergen-Webb, CCR, RPR, Notary Public in and for the State of Washington, the following proceedings were had, to wit:

<<<<<< >>>>>>

PROCEEDINGS

MS. NELSON: I would like to call this meeting to order, please. My name is Susan Nelson. I am chairman of the Regional Committee, and I declare that we do have a quorum tonight.

First of all, can you hear me in the back?

VOICES: Not very.

MS. NELSON: Now can you hear me?

VOICES: Yes.

MS. NELSON: Thank you. At this time, I would like to introduce those of us that are up in front, and we all do have name plates on us.

Starting on my far right is Jane Murray, who is assistant fiscal officer for financial services. Next is Carter Bagg, the regional coordinator for OSPI. Then is Mick Moore, who is assistant to the superintendent, and Harvey Erickson, who is an assistant superintendent for financial services.

And then we have members of the Regional Committee, Dan Rollins, Pat Hinneberg, Tim Hatley, myself,

John Lynn, Pete Francis. And then we have Monte Bridges, who is the superintendent of the Puget Sound ESD; Anne Shaw, who is assistant attorney general. And then at the far end we have Dr. Thom Dramer, who is the -- what's your title, Thom?

DR. DRAMER: Consultant.

MS. NELSON: Consultant, okay.

Our district representatives from Steilacoom, do we have Dr. Arthur Himmler here? Thank you, and from Clover Park, Dr. Doris McEwen Walker? Thank you.

At this time, we our having a continuation of our hearing, and the purpose of this is for the Regional Committee members to complete the hearing and come to a decision as set forth in the statute regarding transfer of territory from the Clover Park School District No. 400 to the Steilacoom Historical District No. 1.

This proposed transfer of territory is undertaken by the Regional Committee on School District Organization under RCW 28A.315.095. At this time, there will be no more testimony taken, but the Regional Committee may ask questions of either party, and I -- during these deliberations, and I know that there are questions that will be asked.

At this time, an announcement that, first of all, the Committee . een furnished copies because we asked for the legislative history of the territory in question. This is no opinion, just copies out of -- what would you call it, Anne?

MS. SHAW: The legislative history of the RCWs.

MS. NELSON: Of the RCWs. There are copies available to both districts, if you wish to look at them. The other thing is because, as you can see the Committee tonight, we have six members present. As the Chair, under statute, in order to avoid a tie, I will excuse -- I will not vote -- be a voting member of the Committee unless there is a tie, unless someone chooses not to vote, so that we can come to a conclusion on our decision tonight.

Are there any questions from the Committee at this time just for our procedures?

ALL: (No response.)

MS. NELSON: First of all, you've all gotten your materials. I assume you have read them as well as you can. Is there anything you wish to bring up or anything before we start all of this?

ALL: (No response.)

MS. NELSON: Okay. We have the transcript, which was the easiest thing to read, I know, for most of us. We have all of the materials that were handed out three weeks ago on November 5th, and then we have all the materials that we requested on the history of -- the legislative history and other materials that some of the members requested through Anne.

At this time, I guess the first thing we need to do is make a motion so we can discuss, or do you have questions you wish --

MR. ROLLINS: Could we go through the checklist first?

MS. NELSON: Yes, obviously, sorry. Some of you are not familiar with the procedures of this, and I guess we need to kind of explain, since I know you don't have copies of everything that we do. I think you --most of you are familiar with the issues that we've discussed on this, the-circumstances and the -- I guess the --

MS. SHAW: The criteria.

MS. NELSON: What?

MS. SHAW: The criteria.

MS. NELSON: Yeah, the criteria we're looking at, and it is not an idea that we have, say, ten criteria, and it's not a voting that there are six in favor and four against. It doesn't work that way. We look at them all as a whole. We look at them individually, and we take each one into consideration, and we weigh them in our minds, and then at the end, we have a vote on them.

So we have a checklist, and we go through each one and ask if they've been considered, and we look at them, and then after that is finished, then we have our discussion as to, you know, what we want to talk about. And that is where we will really, you might say, get into the meat of the whole issue.

So I think all of the Regional Committee members have a copy of this. This is the sort of a canary yellow piece of paper that was on the desk here when you got here tonight.

We, the members of the Regional Committee have given consideration to the following items in making our decision to approve or deny transfer of the following territory

in question, Clover Park School District to Steilacoom Historical School District. Consideration will be defined as we have read the materials submitted to us, and we have listened to testimony given at the hearing.

No. 1: "Would approval of the proposed transfer involve student educational opportunities as measured by the percentage of students performing at each level of the statewide mandated assessments and data regarding student attendance, graduation, and dropout rates?"

If you have enough information on this, please say "aye."

ALL: Aye.

MS. NELSON: Okay. No. 2: "Would approval of the proposed transfer improve the --" well, I better back up.

Are there any nays on that?

ALL: (No response.)

MS. NELSON: Okay. No. 2: "Would approval of the proposed transfer improve the safety and welfare of pupils in the area proposed for transfer? 'Safety' means freedom or protection from danger, injury, or damage, and 'welfare' means a positive condition or influence regarding health, character, and well being."

If you have enough information on this, No. 2, would you please say "aye"?

ALL: Aye.

Appendix AA

MS. NELSON: Not enough information, "nay."

ALL: (No response.)

MS. NELSON: No. 3: "Does the proposed transfer involve an entire master-planned community that has been or is proposed to be developed pursuant to an integrated commercial and residential development plan with over 1000 dwelling units?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: No, "nay"?

ALL: (No response.)

MS. NELSON: Okay. No. 4: "If yes, would the entire master-planned community benefit from inclusion within a single school district for school attendance and corresponding tax support purposes."

If you have enough information, please say "aye."

ALL: Eye.

MS. NELSON: Not enough information, "nay."

ALL: No response.

MS. NELSON: Okay. No. 5: "Are there any other facts pertaining to the history and relationship of the

proposed transfer area to the students and communities affected by the transfer that support the proposed transfer."

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough information, "nay."

ALL: (No response.)

MS. NELSON: No. 6, Geographic Accessibility: "Would the proposed transfer result in improved travel corridors due to mountains, hills, valleys, wasteland, and related geographic and man-made features?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough information, "nay."

ALL: (No response.)

MS. NELSON: "B" under Geographic Accessibility: "Would the proposed transfer result in improved traffic corridors due to rivers, lakes, canals, and other natural or man-made waterways and bodies of water?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough information, "nay."

Appendix AA

ALL: (No response.)

MS. NELSON: "C" under Geographic Accessibility: "Would the proposed transfer result in improved traffic corridors due to the extent and nature of roads, highways, ferries and traffic patterns."

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough information, say "nay."

ALL: (No response.)

MS. NELSON: And "D" under Geographic Accessibility: "Would the proposed transfer result in improved traffic corridors due to improved climatic conditions?"

If you have enough information please, say "aye."

ALL: Aye.

MS. NELSON: Not enough, "nay."

ALL: (No response.)

MS. NELSON: Letter "E" under Geographic Accessibility: "Would the proposed transfer result in a reduction of the time required to travel to and from school for the students residing in the proposed area?"

If you have enough information, please say "aye."

ALL: Aye.

Appendix AA

MS. NELSON: Not enough information, say "nay."

ALL: (No response.)

MS. NELSON: No. 7: "Do the factors related to geographic accessibility --" items which were 6(a) through (e) -- "in the aggregate warrant a favorable consideration of the proposed transfer?"

If you have enough information, please say "aye."

ALL: "Aye."

MS. NELSON: Not enough information, say "nay."

ALL: (No response.)

MS. NELSON: No. 8: "After considering the factors related to geographical accessibility, would approval of the proposed transfer reduce or increase the individual transportation costs of the affected districts?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough say "nay."

ALL: (No response.)

MS. NELSON: "Would approval of the --" No. 9: "Would approval of the proposed transfer reduce or increase the aggregate transportation costs of the affected school districts?"

Appendix AA

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough say "nay."

ALL: (No response.)

MS. NELSON: "Would approval of the proposed transfer result in a reduction in disparities in per pupil valuation when all funding sources are considered?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough say "nay."

ALL: (No response.)

MS. NELSON: No. 11: "Would approval of the proposed transfer result in an improvement in the economies of administration and operation of schools?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough say "nay."

ALL: (No response.)

MS. NELSON: No. 12: "Would the proposed transfer result in any other positive outcomes that should be considered."

If you have enough information, please say "aye."

Appendix AA

ALL: Aye.

MS. NELSON: Not enough say "nay."

ALL: (No response.)

MS. NELSON: No. 13: "Would the proposed transfer result in any other negative outcomes that should be considered?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough, "nay."

ALL: (No response.)

MS. NELSON: No. 14: "Would approval of the proposed transfer allow the needs of the affected citizens and students to be served responsibly by contributing to logical service boundaries and recognizing a changing economic pattern?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough, "nay."

ALL: (No response.)

MS. NELSON: No. 15: "Would a proposed transfer promote a wiser use of public funds through improvement in the school district system of the educational service districts and the state?"

Appendix AA

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough, nay.

ALL: No response.

MS. NELSON: And the last one: "Would approval of the proposed transfer advance the best interest of public education in the affected school districts and communities, the educational service district and the state?"

If you have enough information, please say "aye."

ALL: Aye.

MS. NELSON: Not enough say "nay."

ALL: (No response.)

MS. NELSON: Okay. Now, to get into our discussion, we need to start with a motion, and so we need to have a motion on the floor so we can discuss things, and so is there someone who would make a motion to approve the transfer?

MR. ROLLINS: Well, Madame Chair, I'll make a motion to approve the transfer of territory from Clover Park School District to the Steilacoom Historical School District to be approved on the basis that such transfer meets the criteria stated in RCW 28A.315.205.

MS. NELSON: Is there a second?

MS. HINNEBERG: (Raises hand.)

Appendix AA

MS. NELSON: It's been moved and seconded to move the transfer of territory from Clover Park School District to the Steilacoom School District be approved on the basis that such territory meets the criteria stated in RCW 28A.315.205 as evidenced by the attached Regional Committee transfer of territory checklist.

Okay. Discussion?

MR. ROLLINS: Since I started it, I guess I'll start out by saying I'm not happy approving it. I am not happy with the way the legislature changed the laws that we work under. I feel that a couple of these were written specifically for this particular transfer.

Be that as it may, I've got to follow what the law says no matter what I feel about that. This is a no-win situation for the Committee because either wav, it doesn't look good. If it passes, it doesn't look good for one, and if it fails, it doesn't look good for the other.

Both sides have very valid arguments, in my opinion, in different areas. The master master-planned community is I think a worthwhile goal, having entire neighbors served by one school district. I really do hatc streets being divided in half, unless they're four-lane arterials with lots of traffic on them, but when you have residential neighborhood streets divided, I don't like that.

On the other hand, I don't agree with the way we are required to look at test scores because I don't think test scores are apple to apples. Particularly, in this case, I think this is a case of apples versus elephants. I don't think they are a valid consideration between the two.

Appendix AA

I think we've pretty much -- the safety issue is a moot point between each one. History, there's lot of history involved, all kinds of lines moving around here between former school districts that aren't there anymore that have been absorbed; federal laws about military bases being treated or being served by one school district. There's really no geographic changes. I think our entire geographic paragraph is unrelated to this one.

Travel costs, once new schools are built in Steilacoom, there would be a decrease in costs, but in the meantime, it looks to me there would be an increase in costs to them. Maybe -- probably the thing that makes it most difficult for me is the money situation, which we are going to have to talk about obviously.

The way the federal -- the way our state statute is written, we have to look at funding source, amounts of funding that districts receive that don't necessarily go to the district as a whole, but they're for specific areas of education, and because the statute has been changed that we're not looking at assessed valuation, we have to examine all of it. It -- I think it makes a skewed picture.

Clover Park certainly receives more per student once you take every situation under account, but that's not what the voters look at. The voters look at assessed valuation because that's the constant. That's the one thing that every district always has. They have the same amount of land, and the valuations usually slowly rise with time, and by taking such a huge chunk from one area and giving it to another, I'm not happy with it, but my happiness or unhappiness is not a consideration.

Appendix AA

I'm -- in my reading of the requirements that we have to follow under the way the RCW is now written, I see this as something that needs to be approved.

MR. FRANCIS: Okay. Can you hear me okay? First of all, I concur with everything you said, except for the part about we are compelled, and I still don't know how I'm going to come out tonight.

But I read the new legislation as maybe adding something that in some ways is common sense, and that is you look and you say, well, if it's a master-planned community, maybe that's something to consider as to whether or not you want to keep it all together in one district. It certainly doesn't say you have to do that just because of that, and it doesn't say this trumps everything else or overrides everything else.

So I think we have to look at all of the considerations, and this is certainly a difficult one for me because there -- I think there's some very good arguments both for and against this transfer, and maybe I'll come out with, you know, what do the people want that are in that proposed area as the ultimate tie-breaker, but as we go through the criteria that are set forth in the statutes, improving student educational opportunities, I kind of agree with you. I think it's a wash. I really think that there are excellent educational opportunities in both districts, and I don't see that as a major consideration one direction or another.

Safety and welfare of the students, the same way. If you're looking at the statistics that we have, it looks like per pupil breakdown of unsafe events is similar. I don't think it's a major consideration. Certainly it does involve an entire master-planned community, and probably that master-

planned community would benefit from being in one place. So I think that consideration weighs towards the transfer.

If we have to look at whether there are other facts about the history and relationship of the proposed transfer, and I think other committee members may bring up some of those things. I look at the accessibility, and as we heard, you know, there's greater accessibility to some of the schools, and some of them are farther away than some of them.

In the Clover Park School District, I am not sure that this is a major consideration. Probably some of the time, especially for the younger children, it would reduce the time involved in travelling to school. We have a number of considerations that are so general that you could look at just about everything you could. One is the one about any negative outcomes that should be considered, and another one is whether or not the transfer advances the best interest of public education in the affected school districts.

I think we've had some very strong arguments for, and we've been presented with a lot of facts that would indicate that, at least in the Clover Park district, you're going to have a reduction in diversity, especially economic diversity among the students. Is that a serious consideration? I think that it is to the extent that the greater the mix, the better the education usually. So that, I think, you know, is an argument against the transfer.

As I go through these other considerations that we have under the statute, I think there are pros and cons, and I think that we have to look at them, and I think if you think one thing is decisive or not is a matter for your judgment. I will probably end up saying, well, you know, all other things balancing out, that maybe I would go with what the parents

in that area want to do in that planned community, but I'm not sure, and I am certainly willing to listen to the arguments and thoughts of all of the other members.

MR. ROLLINS: I would like to add, too, if this committee had the authority to modify the boundary, I would find this much more palatable if I could have laid some of that assessed valuation in the business area within Clover Park because there's no -- I can't say, and no one has certainly given me any paperwork to support that every person that works in those jobs lives within this school district.

So I think there's very likely people that don't live there, and that could easily justify an argument for maybe leaving some of the area out, but we don't have that ability. We have to take it the way it was given to us, and yeah, you're right, Pete, I'm certainly not going to say that. I had to make -- I felt I had to make the motion for, but that's not to say that someone might say something here right now to make me vote against my own motion.

MS. NELSON: Anyone else at this time? Tim?

MR. HATLEY: I have some thoughts.

MS. NELSON: Go right ahead, Tim.

MR. HATLEY: What I thought I'd try to do is at least put it into a little perspective in terms of how I understand this situation and maybe offer up an amendment to the motion.

Appendix AA

The way I see it is in about the late '80s, there was an agreement made between Steilacoom School District and Quadrant or WRECO in terms of a master-planned community, and I think we've been provided with, and I have not been able to study as much of this information as I would like to, but generally the scheme of it, it seems to me there was an arrangement made or a deal struck in terms of, you know, schools, and they signed the agreement.

They moved forward -- the county or the city at that time moved forward with the zoning and the MPD and those sorts of arrangements, and the school district and the landowner moved forward with trying to implement what they agreed to in the agreement, which included recognizing that they needed to change the school district boundary in order to accommodate the deal.

They came to this Committee, and they were denied, and over time, they went back, went to the state legislature. The law was modified in a number of different elements, and one of the provisions was the recognition of MPDs, the idea that they are all in one school district, and as Representative Talcott testified, provided us with a landing pad, so to speak, in terms of this Committee being able to go through.

At the same time, the legislature modified legislation which directed the school districts to negotiate and hopefully come to resolution in terms of these petition proposals. What I've been sort of concerned about in reading through the minutes, and we had some testimony at the last meeting, the negotiation between the two school districts, and it didn't really work very well.

They had two meetings, and you know, they -- one school district had an offer on the table. Another school

district had -- and there's a whole notion that it ultimately would come to this board to be resolved.

I remember asking at the last meeting was, one of the school district representatives, I said, "Why didn't you do a mediator, facilitator which is provided under the statute to come to resolution," and he said, "Well, we are so far apart that we can't do it." So the issue's in front of us today.

I was looking at the statute, the state statute, the 28A.315.095, Section 8, because there's two questions ultimately that we have before us, and one is the approval of the transfer, and the second is the financial element to it, and the financial element to me is a very tricky concept, and I'm -- the school districts themselves couldn't even come to a way where they would. have the discussion of what if and what -- how would that work out.

My first choice would be is can we go back to the school districts and make them do that and then come back to us with a resolution on it, but obviously they've testified that they could not do that.

The statute allows, 28A.315.095, Section 8, Item B, "on every proposal for adjustment of the assets and of the liabilities of school districts provided for in this chapter. Three members of the Regional Committee or two members of the Committee and the educational service district superintendent may be designated by the Committee to hold any public hearing that the Committee is required to hold."

And I would take that a step further to suggest, as an amendment to the motion, that we create a subcommittee to review the financial implications of this proposal, come back to the full committee with a recommendation on the equitable

distribution of the assets, contingent or provide that the full committee would approve the transfer.

I think that the school districts have punted in term of their obligation to, resolve this issue. It's been sent to us. I think that whichever way we rule will be appealed to the State Committee, and I think it's our obligation to, in the best fashion that we can, to come up with our rationale in a written format in the form of a resolution that takes into account our criteria, as well as a proposal on the equitable distribution of the assets.

I think that there may be more latitude -- this is much more of a complicated issue than we've dealt with over the years, and that I think it's worth further study on our part to see what -- what our abilities are to determine what that equitable distribution of those assets are.

MR. FRANCIS: Madame Chairman, I just think that -- I almost always agree with Tim because he's got his eye on the ball and knows what we need to do, but I disagree with the process that he proposes.

I think we need to make a decision on this [illegible] first, and only if the decision has been to transfer, then we have to make those other financial decisions. And everything that he has stated goes to the issue of the finances, not to the issue of whether we should transfer. I haven't heard anything, anyway, unless we make a decision based on punishing people for not discussing things or something, which I don't think that's our job.

I think our job is once it's here, we have to decide on the basis of the criteria in the statute and what's best for the educational opportunities for the kids basically. And so I

think we ought to make that decision. Whether we can go on with anything more tonight or whether we have to come back afterwards with a lot more data to make the decisions on the financial aspects, that's another question, but I think that's Step 2, and I think we ought to keep those questions separate, and do it step by step. This is just my recommendation, Madame Chairman.

MS. NELSON: Thank you. Do you have anything to add to that?

MR. ROLLINS: I was basically going to say pretty much the same thing that Pete said because if we nave to have a second motion, if it is approved, the financing is a completely separate motion. So I think that that would be more appropriate than if it is -- if it does pass on board, that it would have to be bought up at that time, and I have to say that I think it's a great idea because this is -- this is a wild one.

MS. NELSON: Do you have anything?

MR. LYNN: I've heard in the past on testimony at other hearings something that I think makes good sense.

You know, in the law, it says negotiate, but as I understand it, it's pretty hard for a school district to negotiate away their fiduciary responsibility to their constituents, and in this case, either way, I think that that's one of the limiting factors that a school district has is they're charged to protect those assets by the school district. So that makes it a very difficult decision, and I'm not sure negotiation really works. In fact, I'm not sure that word "negotiation" should be in the act.

Appendix AA

I want to say that I agree with Mr. Francis that because there's a master-planned community, and that's considered in Items 3 and 4, does not mean that's mandatory, just to be considered, as well as the other 14 points we look at.

When you take everything that was given to us by both districts, it really boils down to you are all doing very hard work in the way of student achievement and working in their district on the welfare and safety of the students. All of the other factors, except for 3 and 4 and 13, 14, 15 and 16, probably are a wash.

So we're here tonight to decide, yes, is it a master-planned community? If it is, would the community benefit from the inclusion within a single school district for school attendance and corresponding tax purposes? And if so, what happens to the financial impact to both districts?

I'd agree with Mr. Hatley that if the motion does pass, the motion before us, that it would be a good idea to have a subcommittee meet and discuss those financial impacts again to make sure we're very clear on where we're going. That's where I stand.

MS. NELSON: Okay. Any others? Pat, do you have any comments you wish to make?

MS. HINNEBERG: Well, when I was reading through the statutes, I came to the same part of the law that you said, and my concern was how do you divvy it up if the proposed motion is approved at this time? And of course we don't have an answer to that right now.

And yes, is it a master-planned community? Yes, it is a master-planned community, but I agree with you that it is one of the considerations, and when most of the other points that we see on the checklist, the criteria that we're to evaluate, that some are strong, some are weak, and we can go right down both school districts and say, yeah, you're good here, you're good here.

So then it boils down to, again, how do we look at, and in consideration, how do we look at the master-planned community as it relates to the statute.

So right now, I don't know which way I'm going to go, to be honest.

MS. NELSON: Any comments?

ALL: (No response.)

MS. NELSON: Yeah. First of all, I wanted to thank both school districts for all the information they both presented at the last meeting and for the other information that we have received. You both did an excellent job with giving us what we asked for and making it in quite easy-to-read and well-presented fashion.

I have some real questions about it, too. They are the same we all have. Yeah, it's a master-planned community. I've kind of questioned that when these boundaries are being asked to be changed, they are so detrimental to one district and so favorable to the other, that I find that almost untenable in my mind.

It's obvious that they want the children all to be together, but when you take such a huge amount of the

commercial and industrial land, it almost impoverishes Clover Park in this case.

VOICE IN AUDIENCE: Oh, come on.

MS. NELSON: I'm sorry. That is unacceptable. We do not allow that.

In terms of taking the percentage of their assessed valuation, by our standards, it is a very large number and a very large amount of money. So it affects the taxpayers very adversely. It affects them in both districts, but it affects them adversely in Clover Park and favorably in Steilacoom, if we were to transfer the assets and liabilities as I'm sure many of you think they would be or should be.

The other thing that bothered me a lot was the mitigation agreement that Steilacoom signed with Weyerhaeuser Real Estate Company, and I understand the history of it and how it happened, but it seems to me there was almost a foregone conclusion that Steilacoom was going to get that land, and so they got a school site.

Now, what happens if they don't have the transfer of territory? According to the way I understand it, you cannot build a school on land that is not in your district. So that land would have to be sold, traded, used for another purpose. I found that just almost a presumptuous way to look at it as if it's our right to have this, so we'll have this land. And it bothered me, I guess, is they way I would look at it.

And again, going to the legislature and having a statute almost designed for this area, it looks like -- it feels unbalanced to me. It feels like there's a lot of people working

against Clover Park, and I do feel it will really hurt Clover Park if this took place.

Does the Committee have more comments or do you have more questions? Do you --

MR. HATLEY: Sure, just to keep the discussion going because it's getting some interesting new thoughts on the table, and I guess I believe -- as I've been thinking about this, I could -- you know, provided that the distribution of the assets were equitable, I'm in support of the transfer for the reasons which have been stated.

And I think a lot of that goes that there was a determination by the state legislature that the inclusion of an MPD is a consideration, and if we're looking at growth management in the larger context, that's the right decision. I'm concerned, and I think we're all concerned, about how we got here, and now we know that if you're an MPD, you have a bit more sway than you do if you aren't, but that's where we're at.

So I guess that's why, to me, the notion of the approval of the transfer is contingent upon knowing what the distribution of the assets are, and Pete, maybe you and I just philosophically disagree on that, but my amendment to the motion would be it's, you know, contingent on the formation of the committee that comes back to the full body that approves. And if it's two separate motions at the end of the day, I'm comfortable with that, but I want to -- I want to know the whole deal before I'm willing to approve this transfer.

MR. ROLLINS: Madame Chair, I'm willing to amend my motion based on what Tim has just said and

understanding the reasons why he wasn't a part of the original motion because I would have to agree that if this did pass, there is a certain -- there is a huge discomfort level about the valuation, and if we can -- if it takes that type of assurance, it will be done correctly and not just take a hatchet to something here. I'm certainly willing to amend my motion.

MS. NELSON: Other comments, Pete or John?

MR. FRANCIS: I don't know how that would fit with the person who seconded the motion.

MS. HINNEBERG: I have no problem with that because my -- one of my major concerns is that equitable distribution.

MR. LYNN: I already mentioned that I would support Tim's idea of a committee, but I think personally that we have the votes for approval and then establish the committee as a second motion, but we're not doing anything.

MS. SHAW: The committee can choose, if they choose, to do what Tim has suggested, or they can choose to approve it, whichever way the Committee decides to go. If you choose to obviously put this off, you are not going to get a decision tonight. What you're asking for is more information.

MR. FRANCIS: Tim, I take it then that what you're saying, if you're -- as of this point, I take it since it's been accepted by the mover and seconder of the original motion, we now have the amended motion, and so the intention of this motion is that it is contingent, and therefore

if we say "yes," we'll transfer it contingently, and then we come back and we say, well, we can't make an equitable distribution of the property, and then we undo it and put it back in Clover Park. Is that your thinking?

MR. HATLEY: Yes.

DR. DRAMER: I'm not clear whether the Committee can transfer territory and then decide within that territory which property's assets will or will not be part of that transferred territory. Follow what I'm saying?

MS. NELSON: Yeah.

DR. DRAMER: It's in a sense to -- I think a term we used to use in politics, "gerrymander," that which properties would be transferred and which assets would or wouldn't within the territory.

MR. ROLLINS: It's my understanding that we can't make any changes there. I think the only thing we can look at is perhaps a timetable as we spread it out. That's more along the lines of what I was thinking, not picking and choosing properties because he's right. I don't think we have that kind of authority, and Pete or John, whichever one, I don't believe I've actually amended my motion. The original motion is still on the table.

MR. LYNN: The original motion stands.

DR. DRAMER: And that would be my understanding, that the time table, the timing of the assets which the bonds and the levies and those kinds of distributions over time would be the purview of the Committee to set that.

MR. FRANCIS: Then I would suggest, Madame Chairman, that we do it this way. Number one, if Tim really wants to amend the motion, he make the motion to amend so we can vote up or down whether or not we amend the original motion.

That way if we want to keep the original motion clean, we can vote "no" on his amendment. Then we can do it, which is the way I think the statute wants us to do, is to make a decision. And then after that decision, we do what's -- what we can within the terms of the statute to make sure that that transfer is equitable financially, but I don't think that this contingent thing is a good idea, and I would urge a "no" vote if that motion is made.

MR. LYNN: I'll second that, Mr. Francis.

MS. SHAW: We either need to amend it -- you need to amend the motion, or you need to withdraw your motion. Whatever you want to do. Do you want to -- (Talking over one another.)

Has it been amended already?

ALL: No.

MR. LYNN: We just have what's written right here.

MS. NELSON: The original motion to approve is all we have.

What do you wish to add?

MR. HATLEY: If the intent of the Committee is to form a subcommittee to review it and look at

the assets and liabilities and make a recommendation back to this Committee, I support that motion.

MS. NELSON: So you still want to --

MR. HATLEY: No, I support the original amendment -- the original motion.

MS. NELSON: Okay. You support the original motion.

MR. HATLEY: Provided.

MS. HINNEBERG: If approved, then we have a --

MR. HATLEY: Yes, yes.

MR. LYNN: Well, you nave a right to come back with a motion.

MR. HATLEY: Exactly.

MS. NELSON: Are you all comfortable with that at this time, or do you wish to discuss it any further?

ALL: (No response.)

MS. NELSON: Okay. The motion on the floor is to approve the transfer of territory.

Is there any more discussion, question?

ALL: (No response.)

MS. NELSON: Okay. Take a vote. Dan?

MR. ROLLINS: Aye.

MS. NELSON: Pat?

MS. HINNEBERG: Aye.

MR. HATLEY: Aye.

MR. LYNN: Aye.

MS. NELSON: Pete?

MR. FRANCIS: Aye.

MS. NELSON: Okay. The motion is passed. The transfer of territory has been approved. Now --

MR. HATLEY: Madame Chair?

MS. NELSON: Yes.

MR. HATLEY: Could I make a motion to request the Chair to establish a subcommittee to review the assets and liabilities associated with this transfer and come back with a recommendation to this full body for consideration?

MR. ROLLINS: I'll second that motion.

MS. NELSON: Okay. It's been moved and seconded that we establish a subcommittee of -- how many -- did you say how many?

MR. HATLEY: The statute requires -- it gives you the option of either three members of this committee or two members plus the superintendent of ESD.

MS. NELSON: Now, are you saying to hold a public hearing again over the assets?

MR. HATLEY: I would -- we don't have to.

MS. SHAW: Get the subcommittee together, they do whatever they do, and they come back.

MR. HATLEY: Yes, yes.

MS. NELSON: It's been moved and seconded that we establish a subcommittee with two or three members, I think.

Can we leave it as loose as that?

MS. SHAW: Two.

MS. NELSON: To discuss this and come back to the Regional Committee.

All those in -- any discussion on this?

MR. FRANCIS: Should there be a time limit within the motion, or I guess you could just give the Committee whatever time period you think they need.

MS. NELSON: Probably.

MR. FRANCIS: I don't care.

MS. NELSON: Any other questions?

MR. ROLLINS: Under the statute, the amount of time?

MR. LYNN: No, but I think it should be a relatively short time.

MS. NELSON: I think we will agree with that.

MS. HINNEBERG: Because of when the transfer takes place, that's right.

MS. NELSON: Any other discussion on anything?

MR. HATLEY: I'd only say I'd give it a goal, not a requirement, for the time line.

MS. NELSON: Okay. Is that -- well, first of all, we need to vote on the motion.

All those in favor of this motion?

ALL: Aye.

MS. NELSON: Opposed?

ALL: (No response.)

MS. NELSON: Motion is carried. Now we have a goal of trying to do it as soon as possible. When is a realistic time line?

MR. BRIDGES: I'm just going to go with an estimate because we've to go back and look at calendars and getting people back together. So it doesn't make sense to try to sort that out. So I think we need a minimum of three weeks to do that.

MR. ROLLINS: I was going to suggest three because four weeks is going to be into the Christmas week.

MS. NELSON: Yeah. That probably wouldn't work. The next question is how do we choose who is the subcommittee?

MR. HATLEY: That's the chair.

MS. NELSON: Okay. Do I need to appoint them right now? I suppose I do, don't I.

MS. SHAW: It would be a good idea.

MR. FRANCIS: I should mention to you that I am leaving town for two weeks. I will be back the night of the 23rd of December.

MS. NELSON: That's not helpful.

MR. FRANCIS: I was hoping it would help you to decide who to pick.

MS. NELSON: Are you interested in doing this, Tim?

MR. HATLEY: I wasn't looking to get into work, but I would be happy to participate, sure.

MS. NELSON: Okay. I would like to do it.

MR. LYNN: You've got your two members.

MS. NELSON: Okay. We'll do it and work out some times.

We don't do any more then on assets and liabilities, do we? Okay.

MR. ROLLINS: Do we just continue this meeting again, another continuation?

MS. SHAW: Yes.

MS. NELSON: See if we can meet and set up for -- we're going to try and deal with not Christmas week, but possibly the week before. We're going to try to meet by that time or meet with this committee.

MR. BRIDGES: The subcommittee.

MS. NELSON: Okay. So we're talking about into January. Okay.

Any other questions by anyone; anything else we need to discuss at this time? Monte or Jane or anybody?

MS. MURRAY: Just review of future -- should we go into the review of future petitions?

In the appeal, Snoqualmie Valley School District has appealed to the State Board. They have received that appeal, and I believe that the State Board will hear that appeal in -- is it --

MR. ERICKSON: I believe it's January 16th.

MS. MURRAY: January 16th, and we'll probably have a Committee member and a staff member go to that appeal.

Appendix AA

The University Place and Tacoma petition, they requested a 30-day extension, and that extension expires on December 10th, and if it comes to the Regional Committee, then we'll have to schedule a hearing within 60 days after that.

MS. NELSON: So again, we're talking into --

MS. MURRAY: Into late January, early February.

MS. NELSON: Thank you.

Anything else? So we are not adjourning then. We will just --

MS. SHAW: The Committee will continue after the subcommittee has --

MS. NELSON: Okay. So there's no motion. All right. Thank you for attending. Thank you all for being here tonight.

(Proceedings adjourned
at 6:52 p.m.)

Appendix AA

APPENDIX BB – RCW 4.12.040 & .050

RCW 4.12.040 Prejudice of judge, transfer to another department, visiting judge — Change of venue generally, criminal cases.

(1) No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court. In all judicial districts where there is only one judge, a certified copy of the motion and affidavit filed in the cause shall be transmitted by the clerk of the superior court to the clerk of the superior court designated by the chief justice of the supreme court. Upon receipt the clerk of said superior court shall transmit the forwarded affidavit to the presiding judge who shall direct a visiting judge to hear and try such action as soon as convenient and practical.

(2) The presiding judge in judicial districts where there is more than one judge, or the presiding judge of judicial districts where there is only one judge, may send a case for trial to another court if the convenience of witnesses or the ends of justice will not be interfered with by such a course and the action is of such a character that a change of venue may be ordered: PROVIDED, That in criminal prosecutions the case shall not be sent for trial to any court outside the county unless the accused shall waive his right to a trial by a jury of the county in which the offense is alleged to have been committed.

Appendix BB

RCW 4.12.050 Affidavit of prejudice.

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

APPENDIX CC – RCW 34.05.566

RCW 34.05.566 Agency record for review — Costs.

(1) Within thirty days after service of the petition for judicial review, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action. The record shall consist of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record for the type of agency action at issue, subject to the provisions of this section.

(2) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (4) of this section.

(3) The agency may charge a nonindigent petitioner with the reasonable costs of preparing any necessary copies and transcripts for transmittal to the court. A failure by the petitioner to pay any of this cost to the agency relieves the agency from the responsibility for preparation of the record and transmittal to the court.

(4) The record may be shortened, summarized, or organized temporarily or, by stipulation of all parties, permanently.

Appendix CC

(5) The court may tax the cost of preparing transcripts and copies of the record:

(a) Against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(b) In accordance with any provision of law.

(6) Additions to the record pursuant to RCW 34.05.062 must be made as ordered by the court.

(7) The court may require or permit subsequent corrections or additions to the record.

APPENDIX DD – CLOVER PARK'S BRIEF TO WASHINGTON STATE COURT OF APPEALS FILED JUNE 17, 2005

No. 32953-1-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

CLOVER PARK SCHOOL DISTRICT NO. 400,

Appellant,

v.

WASHINGTON STATE BOARD OF EDUCATION, PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1,

Respondents.

BRIEF OF APPELLANT

Michael W. Hoge, WSBA #6180
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000

Appendix DD

[Table Of Contents And Table Of Authorities Not Included]

Appendix DD

Appellant Clover Park submits this reply to address briefly several of the points made by Appellees State Board, Regional Committee, and Steilacoom in their respective briefs.

I. SUMMARY OF APPELLEES' POSITIONS

The Appellees' positions appear to be as follows:

A. Washington State Board of Education

The proceedings before the State Board were not adjudicative proceedings under RCW 34.05.570(3), and therefore it need not make findings or conclusions or give reasons for its decisions under RCW 34.05.461(3) & (4); it is limited to acting as specified in RCW 28A.315.205(5)(a)(ii) & (iii), and other APA provisions do not apply. The Regional Committee is not a "state agency" and therefore it is not governed by the APA; its decisions are legislative in nature. Good faith negotiations between districts that are parties to a territory-transfer proceedings are required, but the State Board has no role in enforcing that duty. Likewise, the State Board has no role regarding allegations of Open Meetings violations, constitutional violations, or other violations of law with respect to the Regional Committee's actions.

B. Puget Sound Educational Service District Regional Committee

The Regional Committee has no role in enforcing good faith negotiations between districts. The Regional Committee's actions are legislative in nature. Its Criteria Checklist adequately tracked the statutory and regulatory criteria; the Checklist's focus on considering the interests of students in the proposed transfer area, but not all the other students affected, and its omission of one of the two statutory

directions to reduce rather than increase per-pupil tax disparities, is of no consequence. The Committee's consideration of constitutional issues is not necessary; it is fully sufficient if the Committee merely "considers" each of the Checklist criteria in some fashion prior to reaching a decision, and no further constitutional inquiry is warranted. Illegality of result, or of decision-making process, is not an "unreasoning...circumstance" that renders the Committee's actions arbitrary and capricious. The Committee's March 25, 2004 written decision is the same as its motion voted in public session on November 25, 2003, and the fact that there was no further public deliberation after November 25 on the territory transfer, even after Clover Park highlighted the constitutional problems with the Committee's approach, is of no moment. The Committee Chair's indication on March 3, 2004 that she knew other Committee members had read new materials from the parties, the Committee's dinner meetings before its public meetings, the ESD superintendent's sworn statement indicating that "procedural" matters are not within the scope of the Open Meetings Law, and the changes in the Committee's decision between November 25 and March 25 are not sufficient to warrant Clover Park's trial court discovery on the Open Meetings issue, even after Clover Park moved for discovery immediately following the trial court's grant, with conditions, of the Regional Committee's motion to quash.

C. Steilacoom Historical School District

Steilacoom's failure before the Regional Committee to dispute Clover Park's evidence that the proposed transfer would exacerbate racial and socioeconomic isolation is of no consequence because there is no evidence of discriminatory purpose, and Clover Park may not have trial court discovery on that issue, or any other issue, because the matter is an adjudicative proceeding under the APA; Clover Park's

invocation of the court's inherent jurisdiction, its explanations to the trial court that discovery was needed to develop its Open Meetings allegation and counter Steilacoom's asserted constitutional defenses to the segregation issue, as well as its motion for permission to take discovery following the trial court's order quashing discovery, count for nothing. Clover Park's contention that the proposed transfer would unconstitutionally exacerbate existing large disparities in per-pupil tax wealth between the two districts is "baloney," "bravado," and not appropriate for consideration in this case. The Regional Committee and State Board need not address the constitutional aspects of the statutory and regulatory criteria governing territory transfers; it is fully sufficient if the Committee simply "considers" each criterion in some fashion, and if the State Board abstains. The statutory command that the Regional Committee consider all funding sources of affected districts is satisfied by consideration of Steilacoom's evidence regarding the general fund only (omitting any information regarding the capital fund that pays for school construction and renovation). In the face of Clover Park's contrary evidence showing that Steilacoom's overall resources are greater than Clover Park's already, Steilacoom may rely on its own evidence and disregard Clover Park's, even though the Regional Committee's "Findings" are only a paraphrase of the criteria for decision-making and do not purport to determine the truth of any of the evidence offered by the parties. Good faith negotiations between district parties to a territory-transfer proceeding are not required, but if they are, a failure to share requested relevant information can be excused on the basis that representing one's constituents trumps any such duty. The Constitution permits filing an affidavit of prejudice against a trial court judge for reasons that include racial reasons, and a determination regarding an allegation of constitutional violation may be made purely on statutory grounds. But if there is a constitutional issue, it is a

complete answer if the party filing the affidavit of prejudice asserts afterward that there were reasons other than racial ones, and the party's failure to assert directly under oath that race was not a factor (or to state, if race was a factor, that the same decision would have been made in absence of the racial consideration), in spite of an express challenge to do so, need not be considered in evaluating whether a constitutional violation has occurred.

II. ARGUMENT

A. The State Board's Position Denies Clover Park's Due Process Right to Have Its Issues Heard in a Meaningful Time and in a Meaningful Manner

The State Board joined in the Regional Committee's and Steilacoom's trial court motions to quash Clover Park's December 2004 discovery based on the argument that court review of administrative decisions may not include consideration of evidence outside the administrative record (which motions cited only cases in which a developed record with findings and legal conclusions, and/or a full transcript of administrative deliberations, were available for court review). It now has taken the position that the Regional Committee is a not a state agency subject to the APA, and its own review of the Regional Committee is not an adjudicative proceeding under RCW 34.05.570, the statute pursuant to which the legislature directed that the State Board review Regional Committee decisions. (However, the State Board apparently believed its role was a quasi-judicial one, or part of a "matter governed by chapter 34.05," under the Open Meetings Law, RCW 42.30.140(2) & (3), because it retired to executive session to deliberate following the hearing held before it, CP 87, thereby depriving the parties of insight into its

deliberations prior to its conclusory written decision declining to address several of Clover Park's claims.

Although the State Board now says that its review cannot go beyond the factors specified in RCW 28A.315.205(5)(a)(ii) & (iii), its position in the school district boundary case it heard immediately prior to this one was different: there, the State Board decided it should construe the boundary statute as a court would, and made its decision on a basis other than the criteria to which it seeks to confine itself now. Clover Park pointed out this discrepancy to both the State Board, CP 171 n. 7, and the trial court, CP 354 n. 3.[9]

If the State Board is correct, and the matter it heard here was not an "adjudicative proceeding" under RCW 34.05.010(1) and .570(3), but rather governed only by RCW 28A.315.205(5)(a), then it was a matter of "agency action" under RCW 34.05.010(3) and RCW 34.05.570(4), in which Clover Park's constitutional claims were appropriately made and decided, RCW 34.05.570(4)(c)(i), and an Open Meetings Law exemption for the State Board's deliberations is doubtful. Similarly, Clover Park's December 2004 discovery

---

[9] That prior case, in which a citizen-initiated territory transfer petition was opposed by both affected school districts, was decided by the State Board in March 2004 and appealed to King County Superior Court, No. 04-2-08771-6 SEA, and the State Board's decision was upheld on the State Board's grounds; the matter is now pending before Division I of the Court of Appeals, No. 54898-1. While the State Board's reluctance to "take sides" between districts (whose school board members elect the State Board's members) is understandable, its reticence disappears when districts are on the same side. Likewise, one may appreciate the State Board's reluctance, while its reduction and reorganization were pending in the legislature, to address important constitutional issues having implications for state funding of schools. But the fact remains that the State Board's description of its proper role in the present case is inconsistent with its own approach in its immediately-prior case.

should have been permitted, and its motion requesting permission for discovery following the order to quash discovery should have been granted, RCW 34.05.562.

If the State Board is incorrect, then its decision failed to meet the requirements of RCW 34.05.461(3) & (4), and its decision is invalid because it did not make findings and conclusions based upon the record before it.

Either way, Clover Park claims that its (and its students') right to due process is denied by an overall scheme in which neither the Regional Committee nor the State Board enters reviewable findings based on the record and Clover Park is not permitted to engage in trial court discovery to flesh out issues such as the Regional Committee's apparent Open Meetings violations nor Steilacoom's asserted defenses to Clover Park's constitutional claims. RCW 34.05.562. Forbidding discovery is an abuse of discretion if it denies due process. Again, "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'," *Buffelen Woodworking Co. v. Cook*, 28 Wn. App. 501, 505, 625 P.2d 703 (Div. II 1981), citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The Kafkaesque proceedings to date have not furnished such an opportunity, and must be invalidated unless the Court proceeds directly to the central, dispositive school funding issue and reverses finally and cleanly on that basis.

B. The Regional Committee's Approach Disregards the Requirements of the School Reorganization Statute, the Open Meetings Law, and the Constitution

The Regional Committee's brief is wholly consistent with the Regional Committee's actions below in that it does not even

mention the Constitution, even to pay lip service. The Regional Committee persists in its position that the Committee's checking all the boxes on its form, to show it considered all the criteria, is sufficient by itself to shield the Committee's decisions from judicial scrutiny. *See* CP 980 (March 3, 2004 remarks of Superintendent of Public Instruction staffer regarding proper decision-making approach.) The Committee recognizes no obligation or duty to conform its decision-making to constitutional requirements; indeed, under its approach any unconstitutional result, no matter how egregious, would be immune from review so long as the Committee checked all the boxes. The Committee affirmatively asserts that it has the "discretion to determine how much weight, *if any*, to assign each criterion, Brief at 8 (emphasis added), and that "it is the Regional Committee's prerogative to use whatever method they choose...to weigh each factor as long as each criterion is considered," *id.* at 12.

The Regional Committee asserts that its Criteria Checklist accurately captured the statutory criteria, and ignores that the Checklist focused explicitly on whether the transfer of a "master planned community" would be in the interest of students in the transfer area, while ignoring the interests of other students even though the statute does not do the same. Similarly, the Checklist mentions only once the constitutional consideration to reduce, not increase, per-pupil tax disparities, whereas the statute takes pains to do so twice. Thus, although the Regional Committee (like Steilacoom) asserts that Clover Park acknowledges the Checklist is well-constructed, this assertion misrepresents Clover Park's consistent position that the Checklist has those two critical defects.

There was no Regional Committee deliberation on the record of the constitutional issues asserted here by Clover Park,

even after Clover Park's letter highlighting the importance of such matters. The Regional Committee states, Brief at 20, that after receipt of Clover Park's letter (CP 307-11) regarding the constitutional problems with the transfer, the Committee Chair on March 3 stated her "assumption" (rather than the knowledge indicated by her use of "I know...") that the materials and been received by other members *and would be considered.* But there was never any further consideration on the record of such matters,[10] and thereafter the Regional Committee's written decision was issued in a form conveniently minimizing the problems Clover Park had identified with the Checklist. The Regional Committee's "Findings," CP 318-19, were only a recitation of the factors it purported to have considered; no actual determinations of fact were made by the Regional Committee.

How did the Regional Committee, upon receipt in February 2004 of the constitutional and other information from Clover Park, decide not to revisit or reconsider its preliminary decision of November 25, and how did the form of its decision on the merits change from November 25 to March 25? Clover Park believes that those deliberations and decisions were made outside the Open Meetings arena, because they assuredly were not made in a public meeting. The Committee Chair's statements, as well as the ESD superintendent's declaration and the argument of its counsel, evidence the Regional Committee's approach that "procedural" matters need not be taken up in the Open Meeting context. At the very least, the questions about Open Meetings compliance were subject to discovery, as the matter before the Regional Committee was not of an adjudicative or

---

[10] *See* CP 988, Committee member Hatley's March 3 statement, with reference to the Committee's November 25 meeting, that "the Committee decided..."

quasi-judicial nature, with actual findings on the record, as with the authorities cited by Appellees.

The Regional Committee mischaracterizes the sequence of events when it says, Brief at 4, that the Regional Committee deliberated and ultimately approved the petition after reviewing the testimony and evidence. In fact, the Regional Committee's only deliberation on the evidence regarding whether the transfer should be approved came at its meeting of November 25, 2003, following the meeting of November 4 at which information was received from both sides. There was no deliberation regarding the additional information submitted by Clover Park prior to the Committee's March 3, 2004 meeting: the only discussion and deliberation at that meeting concerned the timing of the already-approved transfer, and the timing of the tax changes to accompany it.[11]

As it did before the State Board and the trial court, Clover Park continues to assert that the Regional Committee's action was arbitrary and capricious because it was "wholly unsupportable" in its misconstruction of the statutory criteria through its Checklist, its failure to adhere to the Open Meetings Law, and the illegality of its result under art. IX, §§ 1 and 2 of the Constitution.

The Regional Committee, like the State Board, recognizes no duty to require that the statutorily-prescribed negotiations be conducted in good faith, even though the ESD superintendent

---

[11] The Regional Committee had to receive and consider additional information after the November 5 and 25, 2003 meetings, because otherwise its decision of March 3, 2004 would have been untimely under RCW 28A.315.205(2) and subject to reversal by the State Board on the basis that it did not follow all applicable procedures, RCW 28A.315.205(5)(a)(ii).

urged Steilacoom to share all relevant information as part of the negotiations process. Clover Park does not, as suggested by the Regional Committee, Brief at 23 and 25, equate the failure to reach an agreement as automatically presumptive evidence of bad faith; rather, Clover Park set out in its opening brief the evidence from which it is apparent that Steilacoom proceeded in bad faith.

C. Steilacoom's Positions Are Likewise Meritless

In its double-length brief, RAP 10.4(b), Steilacoom urges that constitutional considerations have little or no place in the present matter. In the face of its failure before the Regional Committee to even respond to, much less dispute, the evidence that the transfer at issue would exacerbate racial isolation, it now characterizes Clover Park's position as being that there is a "per se" rule against any increase in racial isolation as a result of a territory transfer. Steilacoom in effect asks that the Court presume that the undisputed exacerbation of racial isolation will be insubstantial even though the evidence, and reasonable inferences therefrom, is that the over-300 new predominantly white, economically advantaged students in Northwest Landing at full build-out will substantially affect the ethnic and socioeconomic composition of the schools near the Clover Park-Steilacoom boundary. As shared with the State Board, CP 98, for more complete information regarding the demographic characteristics of the Steilacoom and Clover Park schools in 2003-04, see
http://www.k12.wa.us/DataAdmin/pubdocs/p105/

Appendix DD

Oct03P105A DistEthnicEnrlPercentMinority.xls (lines 40 and 251).[12]

Steilacoom remains equally dismissive of Clover Park's contention that on the facts of this case, exacerbation of the property tax disparity between Clover Park and Steilacoom is unconstitutional. To this day, Steilacoom has not responded to Clover Park's argument that the property transfer at issue, in exacerbating substantially the already-huge property-tax disparities in a system that is not fully sufficient to provide for school district capital needs from regular and dependable tax sources, is unconstitutional as applied. It did not respond before the Regional Committee or before the State Board. And now, as it did before the trial court, CP 435, Steilacoom merely asserts without authority that this case is an "inappropriate vehicle" for making a claim related to the constitutionality of Washington's funding of school building construction and renovation. Brief at 21.[13]

As to its affidavit of prejudice against Judge Grant, Steilacoom retains its remarkable consistency in asserting the Constitution doesn't apply: unlike with jury selection, where it is important that racial considerations not taint the judicial process, Steilacoom contends there is no societal interest in protecting against racial considerations infecting the selection of judges. Thus, in Steilacoom's view, even open acknowledgement of racial reasons for affidaviting a judge, or open acknowledgement of purely racist reasons for doing so, would have no constitutional remedy. Steilacoom offers

---

[12] This information is subject to judicial notice. *Clean v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996).

[13] For the Court's convenience in light of its citation by both sides, the Findings, Conclusions and Judgment in the unappealed 1983 school funding decision of Thurston County Superior Court Judge Robert Doran are attached hereto as Appendix A.

no substitute for the *Batson*-type analysis that is used in a wide variety of contexts to "smoke out" whether proferred neutral reasons for taking action are in fact a pretext for partly-racial motivation.

III. CONCLUSION

For the reasons given in its opening brief and in this reply, Clover Park respectfully urges that the decisions below are inconsistent with the Constitution and laws of the State and must therefore be invalidated. Because the territory transfer at issue cannot survive scrutiny under Const., art. IX, §§ 1 and 2 no matter what result would obtain on remand as to Clover Park's other issues on appeal, the case should be remanded to the trial court with the direction to enter judgment for Clover Park.

DATED: August 17, 2005.

PERKINS COIE LLP

By _____
Michael W. Hoge, WSBA #6180
Attorneys for Appellant
Clover Park School District No. 400

Appendix DD

CERTIFICATE OF SERVICE

On August 17, 2005, I caused to be served upon the counsel of record, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing **Reply Brief of Appellant**:

Ms. Anne O. Shaw
Assistant Attorney General
Office of the Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98504
Attorneys for Respondent Puget Sound Educational Service District Regional Committee on School District Organization

___ Via hand delivery
_X_ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Appendix DD

Mr. David A. Stolier
Assistant Attorney General
Office of the Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98504
Attorneys for Respondent Washington State Board of Education

___ Via hand delivery
_X_ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Mr. Christopher L. Hirst
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Attorneys for Respondent Steilacoom Historical School District No. 1

___ Via hand delivery
_X_ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Signed at Seattle, Washington, this 17th of August, 2005.

_____
Michael W. Hoge

APPENDIX EE – CLOVER PARK'S REPLY TO BRIEF TO WASHINGTON STATE COURT OF APPEALS FILED AUGUST 17, 2005

No. 32953-1-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

CLOVER PARK SCHOOL DISTRICT NO. 400,

Appellant,

v.

WASHINGTON STATE BOARD OF EDUCATION, PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1,

Respondents.

APPELLANT'S REPLY BRIEF

Michael W. Hoge, WSBA #6180
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000

Appendix EE

[Table Of Contents And Table Of Authorities Not Included]

Appendix EE

Appellant Clover Park submits this reply to address briefly several of the points made by Appellees State Board, Regional Committee, and Steilacoom in their respective briefs.

I. SUMMARY OF APPELLEES' POSITIONS

The Appellees' positions appear to be as follows:

A. Washington State Board of Education

The proceedings before the State Board were not adjudicative proceedings under RCW 34.05.570(3), and therefore it need not make findings or conclusions or give reasons for its decisions under RCW 34.05.461(3) & (4); it is limited to acting as specified in RCW 28A.315.205(5)(a)(ii) & (iii), and other APA provisions do not apply. The Regional Committee is not a "state agency" and therefore it is not governed by the APA; its decisions are legislative in nature. Good faith negotiations between districts that are parties to a territory-transfer proceedings are required, but the State Board has no role in enforcing that duty. Likewise, the State Board has no role regarding allegations of Open Meetings violations, constitutional violations, or other violations of law with respect to the Regional Committee's actions.

B. Puget Sound Educational Service District Regional Committee

The Regional Committee has no role in enforcing good faith negotiations between districts. The Regional Committee's actions are legislative in nature. Its Criteria Checklist adequately tracked the statutory and regulatory criteria; the Checklist's focus on considering the interests of students in the proposed transfer area, but not all the other students affected, and its omission of one of the two statutory

directions to reduce rather than increase per-pupil tax disparities, is of no consequence. The Committee's consideration of constitutional issues is not necessary; it is fully sufficient if the Committee merely "considers" each of the Checklist criteria in some fashion prior to reaching a decision, and no further constitutional inquiry is warranted. Illegality of result, or of decision-making process, is not an "unreasoning…circumstance" that renders the Committee's actions arbitrary and capricious. The Committee's March 25, 2004 written decision is the same as its motion voted in public session on November 25, 2003, and the fact that there was no further public deliberation after November 25 on the territory transfer, even after Clover Park highlighted the constitutional problems with the Committee's approach, is of no moment. The Committee Chair's indication on March 3, 2004 that she knew other Committee members had read new materials from the parties, the Committee's dinner meetings before its public meetings, the ESD superintendent's sworn statement indicating that "procedural" matters are not within the scope of the Open Meetings Law, and the changes in the Committee's decision between November 25 and March 25 are not sufficient to warrant Clover Park's trial court discovery on the Open Meetings issue, even after Clover Park moved for discovery immediately following the trial court's grant, with conditions, of the Regional Committee's motion to quash.

C. Steilacoom Historical School District

Steilacoom's failure before the Regional Committee to dispute Clover Park's evidence that the proposed transfer would exacerbate racial and socioeconomic isolation is of no consequence because there is no evidence of discriminatory purpose, and Clover Park may not have trial court discovery on that issue, or any other issue, because the matter is an adjudicative proceeding under the APA; Clover Park's invocation of the court's inherent jurisdiction, its

explanations to the trial court that discovery was needed to develop its Open Meetings allegation and counter Steilacoom's asserted constitutional defenses to the segregation issue, as well as its motion for permission to take discovery following the trial court's order quashing discovery, count for nothing. Clover Park's contention that the proposed transfer would unconstitutionally exacerbate existing large disparities in per-pupil tax wealth between the two districts is "baloney," "bravado," and not appropriate for consideration in this case. The Regional Committee and State Board need not address the constitutional aspects of the statutory and regulatory criteria governing territory transfers; it is fully sufficient if the Committee simply "considers" each criterion in some fashion, and if the State Board abstains. The statutory command that the Regional Committee consider all funding sources of affected districts is satisfied by consideration of Steilacoom's evidence regarding the general fund only (omitting any information regarding the capital fund that pays for school construction and renovation). In the face of Clover Park's contrary evidence showing that Steilacoom's overall resources are greater than Clover Park's already, Steilacoom may rely on its own evidence and disregard Clover Park's, even though the Regional Committee's "Findings" are only a paraphrase of the criteria for decision-making and do not purport to determine the truth of any of the evidence offered by the parties. Good faith negotiations between district parties to a territory-transfer proceeding are not required, but if they are, a failure to share requested relevant information can be excused on the basis that representing one's constituents trumps any such duty. The Constitution permits filing an affidavit of prejudice against a trial court judge for reasons that include racial reasons, and a determination regarding an allegation of constitutional violation may be made purely on statutory grounds. But if there is a constitutional issue, it is a complete answer if the party filing the affidavit of prejudice asserts afterward that there were reasons other than racial

ones, and the party's failure to assert directly under oath that race was not a factor (or to state, if race was a factor, that the same decision would have been made in absence of the racial consideration), in spite of an express challenge to do so, need not be considered in evaluating whether a constitutional violation has occurred.

II. ARGUMENT

A. The State Board's Position Denies Clover Park's Due Process Right to Have Its Issues Heard in a Meaningful Time and in a Meaningful Manner

The State Board joined in the Regional Committee's and Steilacoom's trial court motions to quash Clover Park's December 2004 discovery based on the argument that court review of administrative decisions may not include consideration of evidence outside the administrative record (which motions cited only cases in which a developed record with findings and legal conclusions, and/or a full transcript of administrative deliberations, were available for court review). It now has taken the position that the Regional Committee is a not a state agency subject to the APA, and its own review of the Regional Committee is not an adjudicative proceeding under RCW 34.05.570, the statute pursuant to which the legislature directed that the State Board review Regional Committee decisions. (However, the State Board apparently believed its role was a quasi-judicial one, or part of a "matter governed by chapter 34.05," under the Open Meetings Law, RCW 42.30.140(2) & (3), because it retired to executive session to deliberate following the hearing held before it, CP 87, thereby depriving the parties of insight into its deliberations prior to its conclusory written decision declining to address several of Clover Park's claims.

Appendix EE

Although the State Board now says that its review cannot go beyond the factors specified in RCW 28A.315.205(5)(a)(ii) & (iii), its position in the school district boundary case it heard immediately prior to this one was different: there, the State Board decided it should construe the boundary statute as a court would, and made its decision on a basis other than the criteria to which it seeks to confine itself now. Clover Park pointed out this discrepancy to both the State Board, CP 171 n. 7, and the trial court, CP 354 n. 3.[14]

If the State Board is correct, and the matter it heard here was not an "adjudicative proceeding" under RCW 34.05.010(1) and .570(3), but rather governed only by RCW 28A.315.205(5)(a), then it was a matter of "agency action" under RCW 34.05.010(3) and RCW 34.05.570(4), in which Clover Park's constitutional claims were appropriately made and decided, RCW 34.05.570(4)(c)(i), and an Open Meetings Law exemption for the State Board's deliberations is doubtful. Similarly, Clover Park's December 2004 discovery should have been permitted, and its motion requesting permission for discovery following the order to quash discovery should have been granted, RCW 34.05.562.

---

[14] That prior case, in which a citizen-initiated territory transfer petition was opposed by both affected school districts, was decided by the State Board in March 2004 and appealed to King County Superior Court, No. 04-2-08771-6 SEA, and the State Board's decision was upheld on the State Board's grounds; the matter is now pending before Division I of the Court of Appeals, No. 54898-1. While the State Board's reluctance to "take sides" between districts (whose school board members elect the State Board's members) is understandable, its reticence disappears when districts are on the same side. Likewise, one may appreciate the State Board's reluctance, while its reduction and reorganization were pending in the legislature, to address important constitutional issues having implications for state funding of schools. But the fact remains that the State Board's description of its proper role in the present case is inconsistent with its own approach in its immediately-prior case.

If the State Board is incorrect, then its decision failed to meet the requirements of RCW 34.05.461(3) & (4), and its decision is invalid because it did not make findings and conclusions based upon the record before it.

Either way, Clover Park claims that its (and its students') right to due process is denied by an overall scheme in which neither the Regional Committee nor the State Board enters reviewable findings based on the record and Clover Park is not permitted to engage in trial court discovery to flesh out issues such as the Regional Committee's apparent Open Meetings violations nor Steilacoom's asserted defenses to Clover Park's constitutional claims. RCW 34.05.562. Forbidding discovery is an abuse of discretion if it denies due process. Again, "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'," *Buffelen Woodworking Co. v. Cook*, 28 Wn. App. 501, 505, 625 P.2d 703 (Div. II 1981), citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The Kafkaesque proceedings to date have not furnished such an opportunity, and must be invalidated unless the Court proceeds directly to the central, dispositive school funding issue and reverses finally and cleanly on that basis.

B. The Regional Committee's Approach Disregards the Requirements of the School Reorganization Statute, the Open Meetings Law, and the Constitution

The Regional Committee's brief is wholly consistent with the Regional Committee's actions below in that it does not even mention the Constitution, even to pay lip service. The Regional Committee persists in its position that the Committee's checking all the boxes on its form, to show it considered all the criteria, is sufficient by itself to shield the Committee's decisions from judicial scrutiny. *See* CP 980

Appendix EE

(March 3, 2004 remarks of Superintendent of Public Instruction staffer regarding proper decision-making approach.) The Committee recognizes no obligation or duty to conform its decision-making to constitutional requirements; indeed, under its approach any unconstitutional result, no matter how egregious, would be immune from review so long as the Committee checked all the boxes. The Committee affirmatively asserts that it has the "discretion to determine how much weight, *if any*, to assign each criterion, Brief at 8 (emphasis added), and that "it is the Regional Committee's prerogative to use whatever method they choose...to weigh each factor as long as each criterion is considered," *id.* at 12.

The Regional Committee asserts that its Criteria Checklist accurately captured the statutory criteria, and ignores that the Checklist focused explicitly on whether the transfer of a "master planned community" would be in the interest of students in the transfer area, while ignoring the interests of other students even though the statute does not do the same. Similarly, the Checklist mentions only once the constitutional consideration to reduce, not increase, per-pupil tax disparities, whereas the statute takes pains to do so twice. Thus, although the Regional Committee (like Steilacoom) asserts that Clover Park acknowledges the Checklist is well-constructed, this assertion misrepresents Clover Park's consistent position that the Checklist has those two critical defects.

There was no Regional Committee deliberation on the record of the constitutional issues asserted here by Clover Park, even after Clover Park's letter highlighting the importance of such matters. The Regional Committee states, Brief at 20, that after receipt of Clover Park's letter (CP 307-11) regarding the constitutional problems with the transfer, the Committee Chair on March 3 stated her "assumption" (rather than the knowledge indicated by her use of "I know...") that

the materials and been received by other members *and would be considered*. But there was never any further consideration on the record of such matters,[15] and thereafter the Regional Committee's written decision was issued in a form conveniently minimizing the problems Clover Park had identified with the Checklist. The Regional Committee's "Findings," CP 318-19, were only a recitation of the factors it purported to have considered; no actual determinations of fact were made by the Regional Committee.

How did the Regional Committee, upon receipt in February 2004 of the constitutional and other information from Clover Park, decide not to revisit or reconsider its preliminary decision of November 25, and how did the form of its decision on the merits change from November 25 to March 25? Clover Park believes that those deliberations and decisions were made outside the Open Meetings arena, because they assuredly were not made in a public meeting. The Committee Chair's statements, as well as the ESD superintendent's declaration and the argument of its counsel, evidence the Regional Committee's approach that "procedural" matters need not be taken up in the Open Meeting context. At the very least, the questions about Open Meetings compliance were subject to discovery, as the matter before the Regional Committee was not of an adjudicative or quasi-judicial nature, with actual findings on the record, as with the authorities cited by Appellees.

The Regional Committee mischaracterizes the sequence of events when it says, Brief at 4, that the Regional Committee deliberated and ultimately approved the petition after reviewing the testimony and evidence. In fact, the Regional

---

[15] *See* CP 988, Committee member Hatley's March 3 statement, with reference to the Committee's November 25 meeting, that "the Committee decided..."

Appendix EE

Committee's only deliberation on the evidence regarding whether the transfer should be approved came at its meeting of November 25, 2003, following the meeting of November 4 at which information was received from both sides. There was no deliberation regarding the additional information submitted by Clover Park prior to the Committee's March 3, 2004 meeting: the only discussion and deliberation at that meeting concerned the timing of the already-approved transfer, and the timing of the tax changes to accompany it.[16]

As it did before the State Board and the trial court, Clover Park continues to assert that the Regional Committee's action was arbitrary and capricious because it was "wholly unsupportable" in its misconstruction of the statutory criteria through its Checklist, its failure to adhere to the Open Meetings Law, and the illegality of its result under art. IX, §§ 1 and 2 of the Constitution.

The Regional Committee, like the State Board, recognizes no duty to require that the statutorily-prescribed negotiations be conducted in good faith, even though the ESD superintendent urged Steilacoom to share all relevant information as part of the negotiations process. Clover Park does not, as suggested by the Regional Committee, Brief at 23 and 25, equate the failure to reach an agreement as automatically presumptive evidence of bad faith; rather, Clover Park set out in its opening brief the evidence from which it is apparent that Steilacoom proceeded in bad faith.

---

[16] The Regional Committee had to receive and consider additional information after the November 5 and 25, 2003 meetings, because otherwise its decision of March 3, 2004 would have been untimely under RCW 28A.315.205(2) and subject to reversal by the State Board on the basis that it did not follow all applicable procedures, RCW 28A.315.205(5)(a)(ii).

Appendix EE

C. Steilacoom's Positions Are Likewise Meritless

In its double-length brief, RAP 10.4(b), Steilacoom urges that constitutional considerations have little or no place in the present matter. In the face of its failure before the Regional Committee to even respond to, much less dispute, the evidence that the transfer at issue would exacerbate racial isolation, it now characterizes Clover Park's position as being that there is a "per se" rule against any increase in racial isolation as a result of a territory transfer. Steilacoom in effect asks that the Court presume that the undisputed exacerbation of racial isolation will be insubstantial even though the evidence, and reasonable inferences therefrom, is that the over-300 new predominantly white, economically advantaged students in Northwest Landing at full build-out will substantially affect the ethnic and socioeconomic composition of the schools near the Clover Park-Steilacoom boundary. As shared with the State Board, CP 98, for more complete information regarding the demographic characteristics of the Steilacoom and Clover Park schools in 2003-04, see http://www.k12.wa.us/DataAdmin/pubdocs/p105/Oct03P105A DistEthnicEnrlPercentMinority.xls (lines 40 and 251).[17]

Steilacoom remains equally dismissive of Clover Park's contention that on the facts of this case, exacerbation of the property tax disparity between Clover Park and Steilacoom is unconstitutional. To this day, Steilacoom has not responded to Clover Park's argument that the property transfer at issue, in exacerbating substantially the already-huge property-tax disparities in a system that is not fully sufficient to provide

---

[17] This information is subject to judicial notice. *Clean v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996).

for school district capital needs from regular and dependable tax sources, is unconstitutional as applied. It did not respond before the Regional Committee or before the State Board. And now, as it did before the trial court, CP 435, Steilacoom merely asserts without authority that this case is an "inappropriate vehicle" for making a claim related to the constitutionality of Washington's funding of school building construction and renovation. Brief at 21.[18]

As to its affidavit of prejudice against Judge Grant, Steilacoom retains its remarkable consistency in asserting the Constitution doesn't apply: unlike with jury selection, where it is important that racial considerations not taint the judicial process, Steilacoom contends there is no societal interest in protecting against racial considerations infecting the selection of judges. Thus, in Steilacoom's view, even open acknowledgement of racial reasons for affidaviting a judge, or open acknowledgement of purely racist reasons for doing so, would have no constitutional remedy. Steilacoom offers no substitute for the *Batson*-type analysis that is used in a wide variety of contexts to "smoke out" whether proferred neutral reasons for taking action are in fact a pretext for partly-racial motivation.

III. CONCLUSION

For the reasons given in its opening brief and in this reply, Clover Park respectfully urges that the decisions below are inconsistent with the Constitution and laws of the State and must therefore be invalidated. Because the territory transfer at issue cannot survive scrutiny under Const., art. IX, §§ 1 and 2 no matter what result would obtain on remand as to

---

[18] For the Court's convenience in light of its citation by both sides, the Findings, Conclusions and Judgment in the unappealed 1983 school funding decision of Thurston County Superior Court Judge Robert Doran are attached hereto as Appendix A.

Appendix EE

Clover Park's other issues on appeal, the case should be remanded to the trial court with the direction to enter judgment for Clover Park.

DATED: August 17, 2005.

PERKINS COIE LLP

By _____
Michael W. Hoge, WSBA #6180
Attorneys for Appellant
Clover Park School District No. 400

Appendix EE

CERTIFICATE OF SERVICE

On August 17, 2005, I caused to be served upon the counsel of record, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing **Reply Brief of Appellant**:

Ms. Anne O. Shaw
Assistant Attorney General
Office of the Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98504
Attorneys for Respondent Puget Sound
Educational Service District Regional
Committee on School District Organization

___ Via hand delivery
_X_ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Appendix EE

Mr. David A. Stolier
Assistant Attorney General
Office of the Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98504
Attorneys for Respondent Washington State Board of Education

___ Via hand delivery
__X__ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Mr. Christopher L. Hirst
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Attorneys for Respondent Steilacoom Historical School District No. 1

___ Via hand delivery
__X__ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Signed at Seattle, Washington, this 17th of August, 2005.

Michael W. Hoge

APPENDIX FF – CLOVER PARK'S PETITION FOR REVIEW TO WASHINGTON STATE SUPREME COURT FILED MARCH 24, 2006

Court of Appeals No. 32953-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

CLOVER PARK SCHOOL DISTRICT NO. 400,

Petitioner,

v.

WASHINGTON STATE BOARD OF EDUCATION, PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1,

Respondents.

PETITION FOR REVIEW

Michael W. Hoge, WSBA #6180
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000
Attorney for Petitioner Clover Park School District No. 400

Appendix FF

I. IDENTITY OF PETITIONER

Petitioner Clover Park School District No. 400 ("Clover Park") was the plaintiff/petitioner in the trial court.

II. DECISION TO BE REVIEWED

Petitioner requests that the Court review the decision of the Court of Appeals which was filed on February 22, 2006, and which affirmed the trial court's decision to grant summary judgment of dismissal in favor of defendants/respondents Puget Sound Educational Service District Regional Committee ("Regional Committee"), Washington State Board of Education ("State Board"), and Steilacoom Historical School District No. 1 ("Steilacoom"). A copy of the decision from which review is sought is set forth in the Appendix at A-1.

III. ISSUES PRESENTED FOR REVIEW

1. Are the Washington Constitution, art. I, § 12 and art. IX, §§ 1 and 2, the School Reorganization Law, RCW 28A.315.005(1), and the Administrative Procedure Act, RCW 34.05.020 and -.570(3), violated by a school district territory transfer having the effect of substantially exacerbating existing per-pupil property tax valuation disparities between the affected districts, where the State furnishes no funds for capital purposes to districts that have not first secured supermajority voter approval for bond issues?

2. Are the Washington Constitution, art. I, § 12 and art. IX, §§ 1 and 2, the School Reorganization Law, RCW 28A.315. 005(1) , and the Administrative Procedure Act, RCW 34.05.020 and -.570(3) , violated by a school district territory transfer having the effect, according to the

undisputed record before the Regional Committee, of exacerbating student racial and socioeconomic isolation?

3. Does a school district party to a territory transfer proceeding under Ch. RCW 28A.315 have a duty, under RCW 28A.315.195(5), to conduct in good faith the statutorily-required negotiations with its sister district, and if so can its refusal to share relevant information during the course of such negotiations be excused merely on the rationale that it is representing the interests of its constituents?

4. Is a Regional Committee's voted decision--based explicitly upon its weighing of criteria set forth in an administratively-developed checklist--to approve a transfer of territory unlawful, procedurally improper, and arbitrary and capricious where the Committee gives no consideration to whether certain of the statutorily-mandated criteria are of constitutional dimension (and thus entitled to greater weight than criteria and sub-criteria with no constitutional significance); interprets a key statutory subcriterion in other than the ordinary meaning of its wording; considers only the interests of students in the territory proposed for transfer and not the interests of the other students affected by the transfer; and where the administrative checklist overemphasizes the importance of one statutory example subcriterion and leaves out other statutory criteria of constitutional dimension?

5. Does the failure of a school district, in initiating a petition for the transfer of territory under RCW 28A.315.195, to describe accurately the territory sought to be transferred, or to timely and properly correct the error before the final decision of the Regional Committee, constitute a failure to follow all applicable procedures under RCW 28A.315.205(5)(ii), such that the State Board, on review, should have referred the matter back to the Regional Committee?

Appendix FF

6. Is a Regional Committee's final written decision approving a transfer of territory void under the Open Public Meetings Act (OPMA), Ch. 42.30 RCW, where the Committee's final written decision's content departs significantly from that of its voted motion on the issue, the final written decision is framed in terms that appear to attempt to respond to written input the Committee received subsequent to its voted motion but before its hearing was closed, there has been no public meeting or discussion in which the changes were discussed or explained, and the record reveals extra-meeting communication among Committee members as to key issues and the Committee's belief that discussions of "procedural" matters are not covered by the OPMA?

7. Where a plaintiff invokes the inherent jurisdiction of the trial court, under Wash. Const. art. IV, §§ 1 and 6, to consider issues (including allegations of OPMA violations, and of constitutional violations as to which defendants belatedly assert the defense of no improper motivating purpose) raised in lower proceedings of a legislative and "administrative" nature that lack any evidentiary standards, does the plaintiff have the right to pursue normal discovery regarding such contested matters, and if such discovery is not permitted is due process unconstitutionally denied, under Wash. Const, art. I, § 3 and U.S. Const., amendment 14, as to paramount constitutional interests?

8. Under Wash. Const., art. I, § 12 and U.S. Const., amendment 14, may a trial court properly deny, purely on statutory grounds, a motion to vacate an order granting a motion of prejudice, where the motion to vacate raises a constitutional issue, the background facts create a prima facie case of racial motivation, at least in part, for the motion of prejudice, and the person attesting to prejudice does not directly deny or refute the inference of racial motivation, or assert that the motion of prejudice would have been made

with or without the racial motivation, despite a timely express invitation to do so?

IV. STATEMENT OF THE CASE

In March 2003, Respondent Steilacoom initiated a petition under RCW 28A.315.195 to the Regional Committee to have a portion of Clover Park's territory transferred to Steilacoom. AR 207-12.[19] Following the period set by statute, RCW 28A.315.195(5), for negotiations between the two school districts, AR 215-16, 242, 306, 376, 402, 677-715, and following submission of information by the districts to the Regional Committee in its prescribed format, AR 329-46, 356-66, 369-75, the Regional Committee held three hearings, the first on November 5, 2003, AR 748-912, the second on November 25, 2003, AR 914-56, and (after a subcommittee meeting held January 23, 2004, AR 957-60) the third on March 3, 2004, AR 961-1022. The Regional Committee issued a written decision dated March 25, 2004 approving the transfer of territory described in Steilacoom's March 2003 petition, effective September 1, 2008, and transferring taxing authority with respect to the subject territory effective with calendar year 2010, AR 317-24.

In April 2004, Clover Park appealed the Regional Committee's decision on transfer of taxing authority to the Superior Court, CP 15-18, AR 197-204, and appealed the

---

[19] Citations to the Record herein are as follows: References to the Administrative Record filed by the State Board in the trial court, which contains record materials from both the Regional Committee and State Board proceedings, are cited as "AR _." References to the Clerk's Papers in the trial court record are cited as "CP _." References to any of the three verbatim reports of proceedings of the three trial court hearings below are cited by hearing date and transcript page(s), e.g., "8/27/03 RP _." References to the Court of Appeals' decision herein are cited as, e.g., "App. A-1, at __."

Appendix FF

Regional Committee's decision on transfer of territory to the State Board, AR 196, 205. The State Board received most of the record of the earlier proceedings before the Regional Committee, AR 197-204, 206-1051, as well as briefing by Clover Park and Steilacoom, AR 91-123, 128-94. The State Board heard the matter at its meeting of June 18, 2004, AR 3-88, and on June 28, 2004 issued a written decision denying the appeal as to certain issues and declining to address other issues, AR 1-2.

In late July 2004, Clover Park appealed the State Board's and Regional Committee's decisions to the Pierce County Superior Court, CP 1-10, 19-37, and moved to consolidate the pending actions, CP 38-45.

On August 3, 2004, Steilacoom filed a motion of prejudice, CP 50-51, against the assigned judge, the Honorable Beverly Grant, supported by an affidavit of its counsel, CP 48-49; the motion was noted for hearing on August 13, 2004, CP 46-47. On August 6, 2004, Clover Park filed its opposition to the motion of prejudice, CP 52-59. Steilacoom's motion of prejudice was granted without hearing on August 3, 2004, CP 62, 856-57 (the parties received copies on or about August 9, CP 62). Clover Park moved on August 12, 2004 to vacate the order granting the motion of prejudice, CP 60-61, 63-73. Steilacoom opposed Clover Park's motion to vacate, CP 74-118, and Clover Park responded, CP 119-40.

On August 27, 2004, the Honorable Sergio Armijo (to whom the matter was assigned following the August 6 grant of the motion of prejudice) heard argument, denied Clover Park's motion to vacate, and consolidated the pending related actions, CP 141-43, 8/27/04 RP 24-25.

Thereafter Steilacoom, CP 144-49, the State Board, CP 150-54, and the Regional Committee, CP 155-58, filed answers to Clover Park's petition, and the school district parties

Appendix FF

exchanged witness disclosures, CP 159-69, 810-54, 217-19, according to the case schedule, CP 14.

On December 23, 2004, Steilacoom moved for summary judgment, CP 170-216. On December 28, 2004, Clover Park served initial written discovery on each of the other three parties, CP 233-43 (Steilacoom), 301-09 (Regional Committee), 442-49 (State Board).

On January 12, 2005, Steilacoom moved to quash Clover Park's discovery, CP 220-43, on January 13 the Regional Committee filed a similar motion, CP 244-45, 249-60, and on January 13 the State Board joined in those motions, CP 246-48. Briefing by the parties followed, CP 261-317.

On January 24 and 26, 2005, Clover Park submitted its response to Steilacoom's pending motion for summary judgment, CP 318-65, 382-86, 394-97.

On January 31, 2005, Clover Park served followup written discovery on the other parties and noted depositions of certain Regional Committee officials, State Board officials, and witnesses designated by Steilacoom, CP 463-544. On the same date, Clover Park moved for partial summary judgment, CP 393, 398-420, and for any appropriate adjustments to the trial date and discovery schedule, CP 373-81, 387-92.

On February 2, 2005, following oral argument, the trial court granted, with modifications, the pending motions to quash and limit Clover Park's discovery, CP 450-53, 2/2/05 RP 42-43.

On February 3, 2005, Clover Park moved for the trial court's authorization of its discovery, CP 460-569, and filed a second, multi-part motion for partial summary judgment, CP 454-59.

Appendix FF

On February 4, 2005, following oral argument, the trial court granted Steilacoom's motion for summary judgment, CP 776-83, 2/4/05 RP 52-54, and thereafter Clover Park appealed. On February 22, 2006 the Court of Appeals affirmed the trial court's decision.

V. ARGUMENT

As set forth below, Clover Park seeks review of the Court of Appeals' decision on the stated grounds specified in RAP 13.4(b).

A. (Issue 1). Substantial Exacerbation of Existing Substantial Disparities in Property Tax Valuation Between School Districts Is Inconsistent with the Statutory Scheme and Is Itself a Constitutional Violation

The Court of Appeals' decision is in conflict with the Supreme Court's decision in *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978).

The Court's decision in *Seattle* established the State's duty under Wash. Const., art. IX, §§ 1 and 2 to amply provide for education of the State's students by defining and fully funding, from regular and dependable tax sources, the elements of a general and uniform system of public schools. *Brown v. State*, 155 Wn.2d 254, 257-58, 119 P.3d 341 (2005).

The State has delegated its decisionmaking authority over school district boundaries to Regional Committees, *Evergreen School District v. Clark County Committee on School District Reorganization*, 27 Wn. App. 826, 833, 621 P.2d 770 (Div. II 1980), and in the present matter that authority has been exercised in a manner that exacerbates the

effects on Clover Park of the State's existing failure, as to capital funding, to comply with the constitutional command.

Clover Park did not pick this fight, but seeks only to defend its interests, and those of its students and citizens, against the depradations of the Regional Committee, the State's delegee. *See* App. A-8.

It is plain as day: Schools are as necessary to providing education as are teachers and books, but the legislature has not funded the necessary costs of school construction and renovation from regular and dependable tax sources. Not a dime of state funding is provided to school districts for capital purposes until they first pass a bond issue by 60% vote or better, and then state support is only partial. RCW 28A.525.166.

Thus, where the State, through its Regional Committee delegee, alters school district boundaries in a fashion that substantially exacerbates existing substantial per-pupil and assessed valuation disparities between the affected districts, the existing constitutional failure is exacerbated as well: Funding for capital purposes in the disadvantaged school district is even less full, less regular, and less dependable than before. Passing a bond issue—the essential prerequisite to receiving even partial, much less full, state funding for necessary school facilities--is made more difficult, and uniformity in districts' ability to raise needed capital funds is diminished, not enhanced.[20]

---

[20] The Court of Appeals appeared not to apprehend this claim, App. A-1, at 7, perhaps out of a sense that the magnitude of the State's alleged constitutional violation, if present, is so great that even substantially worsening a local district's ability to raise capital funds is almost inconsequential by comparison (at least to the State). But for local districts like Clover Park, which struggle to achieve a supermajority vote even to fund a small portion of their total capital needs, it matters a lot

Appendix FF

Roosevelt School District v. Bishop, 179 Ariz. 233, 877 P.2d 806 (1994), invalidated Arizona's system of school capital funding under a constitutional uniformity clause like Washington's, even where the state furnished some capital funding without a requirement of districts' first securing unpredictable supermajority voter approval. A similar result follows more readily in Washington.

The considerations of RAP 13.4(b) (1), (3) and (4) are satisfied.[21] The issue is highly significant, having substantial implications for the State's discharge of its paramount constitutional duty; the situation is likely to come up repeatedly; the issue has not been presented or considered in prior reported cases; and the issue is uniquely within the purview of this Court to decide. *Brown v. State*, 155 Wash.2d 254, 261-62, 119 P.3d 341 (2005).

B. (Issue 2). Exacerbation of Racial Isolation Caused by the Territory Transfer Is Inconsistent With the Statutory Scheme and Unconstitutional.

As recognized by the Court in *Parents Involved in Community Schools v. Seattle School District*, 149 Wn.2d 660, 680-82, 72 P.3d 151 (2003), it is a significant question under the Washington Constitution whether school segregation is unlawful without regard to whether it is

---

when 60% voter approval becomes more difficult and therefore less dependable, as would happen here if the subject territory transfer is permitted.

[21] While the Regional Committee has avoided, presumably for tactical reasons, so much as mentioning the word "constitution" in its briefing below, the Attorney General's Office, which is well aware of this matter, remains free to seek to provide other input to the Court on behalf of the State, RAP 10.6, and of course the Court may also seek the State's views, RAP 10.6(c).

intentionally caused, and of course the issue is of substantial public interest as well.

Both the school reorganization statutory scheme and the APA require adherence to the constitution in relation to all proceedings under them. RCW 28A.315.005(1); 34.05.020 & -.570(3) . No member of the Regional Committee ever so much as uttered the word "constitution" in the public proceedings in this matter, even when the Committee was specifically asked to consider the constitution after its initial public vote and before its final decision.

Before the Regional Committee, Steilacoom did not dispute at all the segregative effect of the proposed transfer, and only before the State Board did Steilacoom begin to assert that segregation, to be unlawful, must be intentionally caused. As placed before the State Board, the trial court, and the Court of Appeals, the magnitude of the proposed transfer's segregative effect, in relation to the State Board's definitions of racial imbalance,[22] may be readily inferred from official statistics, worthy of judicial notice, of the Superintendent of Public Instruction. And in any case it would be unjustified to presume, in light of the importance of the issue, that an undisputed segregative effect is insubstantial in magnitude.

The Court of Appeals did not address the issue, preferring instead to rely on a formulation requiring proof of intentional discrimination according to a "flagrant racism" or "blatant racism" standard, App. A-1, at 15.[23] *Cf. Columbus Board of*

---

[22] WAC 180-26-025; -27-115. The State Board's definitions of and approach to racial imbalance do not depend upon a showing of intentional discrimination.

[23] The Court of Appeals was not concerned that Clover Park was refused discovery in the trial court on the issue of intentional discrimination, even though Steilacoom waited to raise the issue until the State Board proceedings and there was no opportunity for Clover Park to develop its

Appendix FF

Education v. Penick, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Dayton Board of Education v. Brinkman (II)*, 443 U.S. 526, 99 S.Ct. 2982, 61 L.Ed.2d 666 (1979); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

C. (Issue 3). The Statutory Obligation to Negotiate Over a Territory Transfer Is Not Satisfied Simply by Showing Up, Not Budging, and Refusing to Share Requested Information

As discussed at length in the proceedings below, Steilacoom refused to share requested information with Clover Park at the negotiations stage of the process, and pursued a peremptory "all-or-nothing" approach on the stated rationale that it was serving the interests of its constituents. The Court of Appeals did not address Steilacoom's refusal to share requested information, so its decision means that the statutory obligation to negotiate is satisfied simply by showing up and not budging.

Whether school districts in these proceedings are subject to ordinary standards of good faith, as found in a large number of other legal contexts, is a question of substantial public interest. If there is no obligation, for instance, to share reasonably relevant and available information that is requested during negotiations (as opposed to hoarding the information until hearing to better guard against timely, considered, and knowledgeable responses), a school district desiring to take territory from another need only appear at the "negotiations" and refuse to change its position.

---

responsive contention that Steilacoom and the Regional Committee acted in an intentionally discriminatory and deliberately indifferent manner with respect to the rights of Clover Park and its students.

Surely the legislature, in adding the negotiations requirement in its 1999 statutory revisions and emphasizing the change throughout the legislative history, reasonably believed there was more content to the negotiations requirement than that. After all, it would be the odd mandatory legal duty that does not imply an obligation of good faith. But there is no guidance from the Court of Appeals' decision as to what satisfies the implied duty of good faith.[24] Rather, under the Court of Appeals' decision there is no meaningful content to the statutory duty to negotiate.

D. (Issue 4). The Regional Committee's Decision Was Based on a Faulty Interpretation of the Reorganization Statute and a Lack of Consideration of Constitutional Issues

Reflecting the approach of the Regional Committee, the Court of Appeals stated "In 1999, the legislature provided that master planned communities should be included in one district when possible." App. A-1, at 2.

The court could just as easily have said (and have given its statement similar controlling weight) that "In 1999, the legislature provided in two separate sections that territory transfers should reduce rather than exacerbate per-pupil property tax disparities when possible."

It is a significant question of law under Wash. Const., art. I, § 12 and art. IX, §§ 1 and 2, and U.S. Const., amendment 14, and it is an issue of substantial public interest, whether (as the Regional Committee and Steilacoom have urged repeatedly below) factors of no constitutional significance

---

[24] For reasons unclear, the State Board pointedly observed that there is a duty of good faith in the statutory negotiations, but it declined to address whether the duty was met in this case. AR 1-2.

may trump factors having substantial constitutional significance simply by the device of a regional committee's "considering" all factors in some rote sense, and whether regional committee legislative decisions reached via such "consideration" are thereby immunized from normal constitutional scrutiny.

Similarly, it is a question of substantial public interest whether the words "planned" and "developed" are synonymous, as urged by Steilacoom below and as determined by the Court of Appeals, App. A-1, at 11: As placed before the decisionmakers below, if a "plan to plan" is sufficient to warrant a developer's instigation of proceedings to transfer tax-rich land from a poorer district to a richer one, ordinary understandings of the meaning of words will suffer as much as will the students in the newly-poorer district. Similar future attempts, pursued with utter indifference to the constitutional rights of public school students, may reasonably be anticipated.

E. (Issue 5). Steilacoom's Failure to Properly Describe the Territory Proposed for Transfer Should Have Invalidated the Regional Committee's Decision and Thereby Avoided the Need for Appellate Consideration Now of the Other Issues Present Here

Whether a proposal to transfer territory must accurately describe the proposal, as called for by both the statute and the applicable Regional Committee guidelines, is a question of substantial public interest because overlooking failure to adhere to such an elemental requirement eliminates any value in having clear, reasonable rules for citizens and public entities to follow and leads, as here, to the development of unnecessary issues that the courts must then face.

Appendix FF

F. (Issue 6). The Regional Committee Violated the Open Public Meetings Act

As outlined more fully in the briefing below, the Regional Committee's initial voted decision changed to a different final written decision without public explanation or process. The Chair of the Committee indicated she had extra-meeting contacts with other members; the Committee regularly held private meals before its meetings attended by the Educational Service District Superintendent, who believes that "procedural" matters are not covered by the Open Meetings Law. How the Committee decided to change the form and content of its decision, what was the extent of extra-meeting communications among members, and how the Committee decided to disregard Clover Park's plea to consider constitutional issues before its hearing was closed are all unaddressable in the regime that has prevailed here.

The Regional Committee's urged distinction between procedural and substantive discussions finds no support in the OPMA: If discussions were held outside the public meeting setting that related to the Regional Committee's disposition of the territory transfer petition, the discussions were part of "action" and subject to OPMA's open meeting requirements. *Organization to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996).[25] And of course the OPMA has always required that it be liberally construed. RCW 42.30.910; *Port Townsend Pub. Co., Inc. v. Brown*, 18 Wn. App. 80, 567 P.2d 664 (Div. II 1980).

No party asserts the Regional Committee is not subject to the OPM. Respondents merely contend, as the Court of Appeals decided, that there is no discovery mechanism for pursuing

---

[25] The Court of Appeals decision is in conflict with this decision, RAP 13.4(b)(2).

indications that the Committee did not comply with the law because this matter is an "administrative" one.

The Court of Appeals' indication that Clover Park has not made an offer of proof regarding the violations indicated, App. A-1, at 16, is puzzling: Clover Park has offered direct evidence of the indications of OPMA violations that are present, and until it is permitted to pursue discovery it cannot offer more regarding the details of those matters.

It is a matter of substantial public interest that litigants, particularly litigants who invoke the inherent jurisdiction of the courts, be able to pursue normal discovery as to such matters, rather than be foreclosed from doing so by the device of labeling as "administrative" in nature a proceeding over a legislative decision subject to the OPMA.

G. (Issue 7). The Procedures Followed Below Deny Due Process to Clover Park and the Students Whose Interests the District Represents

Clover Park has consistently taken the position in this matter that, where it seeks to pursue substantial indications of OPMA violations, seeks to gather evidence related to a constitutional defense raised belatedly by another party, and has not confined its claims to those bound by the so-called "administrative record" but has instead invoked the inherent jurisdiction of the courts under Wash. Const., art. IV, §§ 1 and 6, it may pursue such discovery and use the results in the litigation.

It is a significant question of law under the constitutions of Washington and of the United States, and an issue of substantial public interest, whether discovery regarding alleged OPMA violations may be truncated by routing a quasi-legislative decision through an "administrative review"

stage that bears little or no resemblance to typical APA review of administrative decisions. It is a similarly significant and substantial question whether discovery as to intentional discrimination, where one party has claimed such a defense only after the "record" has been closed, may be thwarted by the same device.[26] Wash. Const., art. I, §§ 3 and 12; U.S. Const., amendment 14. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

H. (Issue 8). Steilacoom's Affidavit of Prejudice Against the Original Trial Court Judge Was Unconstitutional

Both the trial court and court of appeals declined to address whether the Washington Const, art. I, §§ 3 and 12, and/or United States Const., amendment 14, bar motions of prejudice against trial court judges for racial reasons. The decision below—that it is sufficient that Washington statute provides an opportunity to file such an affidavit without a stated reason—amounts to a decision that even motions of prejudice that are based on openly stated racial prejudice, or on "flagrant racism," or "blatant racism," are permissible because there is no constitutional interest in preventing, or remedy for, such affidavits.

---

[26] If so, the State might do well to route as many legislative decisions as possible (both decisions of the state legislature and decisions of governing bodies throughout the State) through a similar "administrative" review process, and thereby avoid the inconvenience of pesky litigants claiming entitlement to effective opportunity to vindicate their statutory and constitutional rights via traditional and heretofore well-understood and accepted means.

If the Washington Constitution permitted such an outcome, it would be inconsistent with the requirements of the federal constitution and must yield. U.S. Const., art. VI, Clause 2.

Of course, it is the rare case where improper racial motivations are openly stated, and that is why we have such a broad jurisprudence regarding the "smoking out" of covert improper racial motivation. It is difficult to conceive of how or why the state or federal constitutions would simply be inoperative in cases of improper racial motivation in the striking of judges: The interests of society and the judicial system in avoiding racial discrimination in judge selection appear similar to those with respect to improper racially-motivated challenges of jurors. *People v. Superior Court*, 10 Cal.Rptr.2d 873, 8 Call.App.4th 688 (1992). Thus, this issue is a significant one under both federal and state constitutions, and a matter of substantial public interest as well.

An improper motivation for striking a judge invalidates the proceedings below, for otherwise there would be no remedy for the constitutional violation. *Miller-El v. Dretke*, 125 S.Ct. 2317 (2005).

VI. CONCLUSION

For the reasons set forth above, Petitioner Clover Park School District No. 400 respectfully requests that the Court accept its petition for review.

Appendix FF

RESPECTFULLY SUBMITTED this 24th day of March, 2006.

PERKINS COIE LLP

By _____
Michael W. Hoge, WSBA #6180
Attorney for Petitioner Clover
Park School District No. 400

Appendix FF

Revised CERTIFICATE OF SERVICE

On March 24, 2004, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of **Petition for Review**:

Ms. Anne O. Shaw
Assistant Attorney General
Office of the Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98504
Attorneys for Respondent Puget Sound Educational Service District Regional Committee on School District Organization

X Via hand delivery
___ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Mr. David A. Stolier
Assistant Attorney General
Office of the Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98504
Attorneys for Respondent Washington State Board of Education

X Via hand delivery
___ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Appendix FF

Mr. Christopher L. Hirst
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Attorneys for Respondent Steilacoom Historical School District No. 1

X Via hand delivery
___ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Mr. Robert M. McKenna
Attorney General
State of Washington Attorney General's Office
PO Box 40100
Olympia, WA 98504

___ Via hand delivery
X Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Signed at Seattle, Washington, this 24th day of March, 2004.

_____
Becky Severin

APPENDIX GG – CLOVER PARK'S MOTION FOR DISCOVERY FILED FEBRUARY 3, 2004

THE HONORABLE SERGIO ARMIJO

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

CLOVER PARK SCHOOL DISTRICT NO. 400 of Pierce County, Washington, Petitioner/Plaintiff, v. WASHINGTON STATE BOARD OF EDUCATION, Respondent/Defendant, and PUGET SOUND EDUCATIONAL SERVICE DISTRICT REGIONAL COMMITTEE ON SCHOOL DISTRICT ORGANIZATION, and STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1 of Pierce County, Washington, Interested Parties/Defendants.	NOS. 04-2-07167-0 and 04-2-10015-7 CLOVER PARK'S MOTION SEEKING COURT AUTHORIZATION FOR DISCOVERY AND RELATED CASE SCHEDULE ADJUSTMENTS Note for Motion Docket: March 4, 2005, 9:00 a.m.

Appendix GG

On February 2, 2005, the Court granted motions to quash Clover Park's outstanding discovery. The Order indicates Clover Park may pursue discovery with the permission of the Court. Clover Park hereby moves for authorization to conduct its discovery.

Clover Park does not waive its position that its separate, non-APA, Open Meetings Law, and constitutional claims in this matter entitle it to pursue discovery as to certain of its claims, without prior authorization of the Court. However, in light of the Court's ruling, this motion is filed to enable Clover Park to pursue its discovery consistent with the Court's Order.

For the reasons outlined in the oral argument held February 2 (transcript to be supplied upon its production), Clover Park seeks authorization to pursue its full discovery as propounded on December 29, 2004 to the State Board, Regional Committee, and Steilacoom; on January 31, 2005 to the State Board and Regional Committee; and as set forth in the January 31, 2005 notices of deposition and subpoenas for deposition attached to the accompanying declaration of counsel. Clover Park further seeks appropriate adjustments to the current case schedule, so that the interests of justice and judicial economy are best served.

This motion is based upon the civil rules regarding discovery and article IV, secs. 4 and 6 of the Washington constitution, as set forth in Clover Park's prior filings.

Appendix GG

DATED this 3rd day of February, 2005.

PERKINS COIE LLP

By _____
Michael W. Hoge, WSBA #6180
Attorneys for Clover Park School District

Appendix GG

CERTIFICATE OF SERVICE

On January 31, 2005, I caused to be served upon counsel of record, at the addresses stated below, via the method of service indicated, a true and correct copy of **Clover Park's Motion Seeking Court Authorization for Discovery and Related Case Schedule Adjustments**:

Ms. Anne O. Shaw
Office of the Attorney General
PO Box 40100
1125 Washington St SE
Olympia, WA 98504-0100
Attorneys for Puget Sound Educational Service District Regional Committee on School District Organization

X Via hand delivery
___ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Appendix GG

Mr. David A. Stolier
Assistant Attorney General
PO Box 40100
1125 Washington St SE
Olympia, WA 98504-0100
Attorney for State Board of Education

X Via hand delivery
___ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Mr. Christopher L. Hirst
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Attorneys for Steilacoom Historical School District No. 1

X Via hand delivery
___ Via U.S. Mail, 1st Class, Postage Prepaid
___ Via Overnight Delivery
___ Via Facsimile
___ Via Email

Signed at Seattle, Washington, this 3rd day of February, 2005.

Becky Severin

(2)

No. 06-1215

Supreme Court, U.S.
FILED
APR 5 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

CLOVER PARK SCHOOL DISTRICT NO. 400
OF PIERCE COUNTY, WASHINGTON,

Petitioner,

v.

STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1
OF PIERCE COUNTY, WASHINGTON; PUGET SOUND
EDUCATIONAL SERVICE DISTRICT REGIONAL
COMMITTEE ON SCHOOL DISTRICT ORGANIZATION;
AND WASHINGTON STATE BOARD OF EDUCATION,

Respondents.

**On Petition For Writ Of Certiorari
To The Court Of Appeals Of The
State Of Washington, Division II**

BRIEF FOR STEILACOOM HISTORICAL SCHOOL DISTRICT IN OPPOSITION

CHRISTOPHER L. HIRST*
LAURA K. CLINTON
CARLOS CHAVEZ
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
Telephone: 206-623-7580

*Attorneys for Respondent
Steilacoom Historical
School District No. 1*

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. In Washington, every litigant has the statutory right to remove an assigned trial judge by filing an affidavit of prejudice before any significant rulings occur in the case. Did the trial court properly reject a *Batson* challenge to a party's exercise of its right to remove the originally assigned trial judge where 1) there was no evidence of racial bias by that party, and 2) in response to an objection, the party provided a race-neutral reason for removal?

2. In a consolidated appeal of two state agency decisions under Washington's Administrative Procedures Act ("APA"), brought before a state trial court on a closed administrative record, is the court required by constitutional principles to allow the appealing party to seek discovery during the course of the appeal, where the APA grants the judge discretion regarding the admission of new evidence, and where the party seeking discovery fails to explain why discovery is necessary to the prosecution of its appeal?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
1. Order Reassigning Original Trial Judge	2
2. Orders Quashing Discovery	5
3. The Subsequent Appeals	6
REASONS FOR DENYING THE PETITION	7
1. Clover Park's Motion to Vacate the Order Reassigning the Case Was Properly Denied	7
2. Washington's Statutory Provisions Limiting the Admission of New Evidence During an APA Appeal Do Not Violate Due Process	17
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Barrington v. Eastern Washington Univ., 41 Wn. App. 259, 703 P.2d 1066 (1985) 20

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986) ..... *passim*

Bridle Trails Cmty. Club v. City of Bellevue, 45 Wn. App. 248, 724 P.2d 1110 (1986) 20

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 105 S.Ct. 1598 (1985) 18

Harbor Enterprises, Inc. v. Gudjonsson, 116 Wn.2d 283, 803 P.2d 798 (1991) 8

Hernandez v. New York, 500 U.S. 352, 114 L.Ed.2d 395 (1991) 16

Island County v. State, 135 Wn.2d 141, 955 P.2d 377 (1998) 19

Johnson v. California, 545 U.S. 162, 125 S.Ct. 2410 (2005) 14, 15

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317 (2005) 14

Penberthy Electromelt v. U.S. Gypsum, 38 Wn. App. 514, 686 P.2d 1138 (1984) 17

People v. Superior Court and Williams, 8 Cal. App. 4th 688, 10 Cal. Rptr.2d 873 (1992) 10, 11, 12, 13, 16

Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County, 98 Wn.2d 690, 658 P.2d 648 (1983) 20

State v. Belgarde, 119 Wn.2d 711, 837 P.2d 599 (1992) 8

TABLE OF AUTHORITIES – Continued

Page

State v. Waters, 93 Wn. App. 969, 971 P.2d 538 (1999) 8

State of Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 70 S.Ct. 252 (1950) 12

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975) 9

Washington Indep. Tel. Ass'n v. Washington Util. & Trans. Comm'n, 110 Wn. App. 498, 41 P.3d 1212 (2002) 17, 18

STATUTES

Revised Code of Washington 4.12.040 ..... 1, 2

Revised Code of Washington 4.12.050 ..... 1, 2

Revised Code of Washington, ch. 28A.315 20

Revised Code of Washington 34.05.510 ..... 1, 2

Revised Code of Washington 34.05.558 ..... 1, 18, 19

Revised Code of Washington 34.05.562 ..... 1, 18, 21, 22

Revised Code of Washington 42.17.562 21

Revised Code of Washington 42.30.130 21

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Steilacoom Historical School District No. 1 of Pierce County, Washington ("Steilacoom") respectfully requests that the Court deny the Petition for Writ of Certiorari ("Petition") filed by Clover Park School District No. 400 ("Clover Park").

STATUTORY PROVISIONS INVOLVED

Washington's statutory provisions governing a litigant's right to file an affidavit of prejudice against an assigned trial judge and have a case reassigned are set out in the Revised Code of Washington ("RCW") 4.12.040 and RCW 4.12.050.

The provisions of Washington's Administrative Procedure Act that are relevant to the question of whether and when a trial court reviewing an agency decision on an administrative record may allow the submission of additional evidence include RCW 34.05.510 (Relationship between this chapter and other judicial review authority); RCW 34.05.558 (Judicial review of facts confined to record); and RCW 34.05.562 (New evidence taken by court agency).

For the Court's convenience, these statutory provisions are contained in the attached Appendix.

STATEMENT OF THE CASE

This case arises out of a state trial court's review of two agency administrative orders: 1) the Puget Sound

Educational Service District Regional Committee's ("Regional Committee's") decision to grant Steilacoom's application to adjust a district boundary line and transfer territory from Clover Park to Steilacoom; and 2) the State Board of Education's subsequent order upholding the Regional Committee's decision. Pet. App. C (trial court order); Pet. App. Y (Regional Committee Decision); Pet. App. W (State Board Order).[1] Dissatisfied with both the Regional Committee's decision and the State Board's review, Clover Park petitioned for judicial review under Washington's Administrative Procedure Act ("APA"), RCW 34.05.010, *et seq.* Pet. App. V (appeal petition). The current Petition seeks review of two trial court rulings made during Clover Park's appeal.

1. Order Reassigning Original Trial Judge

All litigants in Washington's state courts have a statutory right to remove an assigned trial judge in the initial stages of a case by filing an affidavit of prejudice. RCW 4.12.040-.050. In this case, Steilacoom filed an Affidavit of Prejudice and corresponding motion regarding the trial judge initially assigned to hear Clover Park's petition for judicial review. Pet. App. U (affidavit); Pet. App. T (motion). It is undisputed that this filing fully complied with all statutory requirements. *See* Pet. App. Q at 104a (Clover Park acknowledges that filing "follow[s] the common practice"). Although the statute creates an absolute right, Clover Park opposed the motion, raising a

[1] The Clerk's Papers in the court file are cited as "CP," while the agency Administrative Record is referenced as "AR." Where material was included in the Appendices to Clover Park's Petition, it is cited as "Pet. App. __ at [page]."

Batson-type challenge and speculating that Steilacoom had a racial motive for filing the affidavit of prejudice because the originally assigned judge was African-American. Pet. App. Q.

Clover Park asserted the following facts as the sole basis for its challenge to Judge Grant's removal: in its petition for review, Clover Park alleged that that the boundary adjustment would have "racially segregative effects"; Judge Grant was one of "few African-American members" of the county bench; and that "without stating any reason, Steilacoom . . . has attempted to peremptorily remove her from the matter." Pet. App. Q at 105a-106a (Opp'n to Mtn of Prejudice). *See also* Pet. App. O at 98a (Mtn to Vacate) ("Clover Park's motion to vacate is based upon the grounds set forth in its Opposition . . . ").

Although Clover Park's assertions did not demonstrate any improper motive for the affidavit of prejudice, Steilacoom responded to Clover Park's challenge, explaining its decision to submit an affidavit of prejudice and denying any racial motive. In these sworn statements, Steilacoom explained that Judge Grant regularly brought suit against school districts when she was in private practice, with a particular emphasis on claims of malfeasance and mistakes by school districts. *See* Pet. App. M at 93a-94a (sworn declaration of counsel explaining that affidavit was based on experience with Judge Grant during private practice and her previous practice of suing school districts for malfeasance); Pet. App. N at 95a-96a (sworn declaration of Steilacoom's Superintendent also recounting experience with Judge Grant's prior private practice). *See also* Pet. App. L at 83a (Steilacoom's Opp'n to Mtn to Vacate) ("Steilacoom emphatically denies Clover Park's assertion that Steilacoom's Motion of Prejudice was

'motivated by race.'"). As Steilacoom repeatedly explained, its decision had nothing whatsoever to do with Judge Grant's race. *See also* Pet. App. I at 64a (statement of counsel at oral argument).

In response, Clover Park claimed that Steilacoom's stated basis for removing Judge Grant was inadequate. Pet. App. J (Reply on Mtn to Vacate). Clover Park claimed that the sworn declarations were also fundamentally flawed because they did not specifically deny that race was a factor or influence in the decision to file an affidavit of prejudice. Pet. App. J at 77a. In addition to its other allegations, Clover Park pointed to two prior statements as evidence of racial bias. In the first, Steilacoom's counsel addressed Clover Park's belated constitutional claims in oral argument before the Regional Committee by saying, in part:

> . . . if you have any questions about the constitutional issues that Clover Park raised, I have a one-page supplemental submission of actual legal argument with authority that tells you that that argument is simply baloney. [Pet. App. Z at 148a]

The second statement was drawn from a passage in Steilacoom's brief to the State Board that described Clover Park's wholesale failure to support its constitutional claims about the boundary adjustment with any relevant evidence or legal analysis. The passage referred to "Clover Park mak[ing] its constitutional claims with bravado . . . ". AR 121. Clover Park claimed that the totality of these facts gave rise to an unrebutted inference that Steilacoom's affidavit of prejudice was motivated by racial discrimination. *See generally* Pet. App. J.

In response to Clover Park's stated concerns about the declarations, Steilacoom provided the trial court with a second sworn declaration of Steilacoom's Superintendent that confirmed that Judge Grant's race was not a factor in the decision to file an affidavit of prejudice. *See* Pet. App. I at 64a.[2] Judge Sergio Armijo, the trial judge assigned to hear Clover Park's motion, reviewed the parties' submissions and oral argument, found no basis to vacate the reassignment, denied the motion, and retained the case. *See* Pet. App. I at 72a-73a (oral ruling); Pet. App. H (order).

2. Orders Quashing Discovery

A few months later, Steilacoom filed a motion for summary judgment based on the administrative record and seeking dismissal of all Clover Park's claims. CP 170-216. The motion was set for hearing, giving Clover Park over a month to respond. CP 170. After Steilacoom filed the motion, and despite the APA's limitations on admitting new evidence, Clover Park served written discovery requests on Steilacoom, the Regional Committee, and the State Board. *See* CP 233-43; 301-09; 442-49. Each of these parties moved to quash, arguing that the limited grounds available for additional discovery in an APA appeal were not present.[3] CP 222-336. Following oral argument, the

---

[2] This document, submitted during oral argument, does not appear to have been placed in the official court file. Its existence, however, is confirmed by the references to it during the hearing. *See* Pet. App. I at 64a, 71a.

[3] The responding parties consistently maintained that discovery was not appropriate or allowed. *See, e.g.*, CP 810-11 ("As the judicial review of these administrative orders does not require, and in most regards prohibits the consideration of evidence beyond the administrative

(Continued on following page)

trial court entered orders quashing Clover Park's discovery requests. Pet. App. D & E (orders). Despite its contention that discovery was necessary, Clover Park never claimed (by affidavit under Washington Civil Rule 56(f)[4] or otherwise) that it was unable to respond to Steilacoom's dispositive motion. Indeed, Clover Park filed several of its own motions for partial summary judgment, apparently without need of the material it sought in discovery. CP 398-420; 454-59.

3. The Subsequent Appeals

On February 4, 2005, Judge Armijo granted Steilacoom's motion for summary judgment, dismissing Clover Park's consolidated APA appeal. Pet. App. C. Clover Park appealed to the Court of Appeals for the State of Washington, Division II, which affirmed. Pet. App. B. Clover Park then sought discretionary review from the Washington Supreme Court, which denied its petition on December 5, 2006. Pet. App. A. Before this Court, Clover Park seeks review of the portion of the Court of Appeals' opinion affirming the trial court's orders 1) denying Clover Park's motion to vacate the reassignment of the trial judge and 2) quashing its discovery requests.

---

records, Steilacoom believes that witness disclosures do not apply to this case.").

[4] *See* Washington Superior Court Civil Rule 56(f) ("Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had . . . ").

REASONS FOR DENYING THE PETITION

Clover Park has not established any basis for further review of this school district boundary dispute. The claim that Steilacoom's affidavit of prejudice must be subjected to equal protection analysis is undercut by Clover Park's utter failure to satisfy any of the standards it claims should apply to such a review. There is no reason to believe that the various state statutes allowing peremptory judicial removal are subject to widespread abuse, nor is there any basis in the record of this case to develop new standards for the review of such peremptories.

Clover Park's contention that this Court should accept review of its discovery dispute under constitutional principles is equally meritless. The trial court acted well within its discretion in reviewing Clover Park's claims on the administrative record. Because Clover Park failed to establish how discovery would lead to new evidence admissible under the APA, made no offer of proof for what it believed discovery would show, and participated without reservation in the briefing of dispositive motions to the trial court, its request for review of this issue should be denied.

1. Clover Park's Motion to Vacate the Order Reassigning the Case Was Properly Denied.

Clover Park asks the Court to extend *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), to state statutes allowing a litigant to remove an assigned trial judge. There is scant legal support for analogizing *Batson* and its progeny to this context. More importantly, there is no evidentiary support for Clover Park's claims. Because Clover Park did not make out a prima facie case of racial

bias, as would be required under any equal protection analysis, this Court should not reach the constitutional issue of whether or not state courts should undertake a *Batson*-type inquiry into affidavits of prejudice filed against trial judges.

In Washington, litigants have the right – once in every case – to remove the initially assigned trial judge and have their matter reassigned to another judge. This right and the procedure for invoking it are spelled out in RCW 4.12.040-.050. Once a party properly invokes the statute, reassignment is mandatory. The Washington Supreme Court "has made it abundantly clear that any party to a suit has the right to remove one superior court judge from a case subject only to the timely filing of a motion and affidavit in compliance with RCW 4.12.040 and .050." *State v. Waters*, 93 Wn. App. 969, 974, 971 P.2d 538 (1999). *See also State v. Belgarde*, 119 Wn.2d 711, 715, 837 P.2d 599 (1992) ("If a party complies with the statutory provisions, prejudice is deemed established, and the judge no longer has authority to proceed further into the merits of the case."). The right is unilateral and does not require the consent of the other party, although the other party has a corresponding right that it may invoke after the case is reassigned.

It is undisputed that Steilacoom's motion and affidavit of prejudice complied with all statutory requirements. *See* Pet. App. Q at 104a (Clover Park's admission that Steilacoom's filings followed standard practice). Under Washington law, that ends the inquiry: "The cases uniformly have held that there is no discretion in granting a timely motion." *Harbor Enterprises, Inc. v. Gudjonsson*, 116 Wn.2d 283, 291, 803 P.2d 798 (1991) (rejecting contention

that exercise of right to a change of judge is subject to scrutiny).

Despite the language of the statute and the cases interpreting it, Clover Park claimed that it could demand a *Batson*-type review of Steilacoom's affidavit of prejudice merely by alleging that its appeal involved allegations of discrimination and therefore Steilacoom may have had an improper motive for removing the African-American trial judge. Pet. App. Q at 106a. Clover Park now asks this Court to rule that *Batson* applies in this context and that the trial court should have vacated the order transferring the case under equal protection principles.

Clover Park asserts that peremptory removal of a single judge should be subject to constitutional scrutiny in the same fashion as are peremptory challenges to jurors. This assertion is doubtful: the respective roles and characteristics of judges and juries in our court system counsel against such inquiry. A jury is a panel of individuals chosen from a pool of lay people that is constitutionally required to fairly represent the community. *See Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692 (1975). Exclusion from a jury based on one's group destroys the representative nature of the jury pool. *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). Judges hold a different place in the American legal system. Although diversity on the bench is undoubtedly a positive thing, there is no constitutional requirement that the composition of the bench in an area represent a cross-section of that community. Thus, the foundation of *Batson* and its progeny is absent in this context.

Clover Park's lone authority for its position is a decision by a California court analyzing a comparable statute. *See People v. Superior Court and Williams*, 8 Cal. App. 4th 688, 701-05, 10 Cal. Rptr.2d 873 (1992) ("*Williams*") (rejecting defendant's claim that African-American judge was removed based on race). In *Williams*, an African-American criminal defendant successfully raised a *Batson* challenge to the prosecutor's use of peremptory challenges to remove African-American women from the jury pool. *Id.* at 695. After several mistrials, including one prompted by defendant's *Batson* motion, the case was reset for trial before a male African-American judge. Pursuant to a California statute similar to the Washington statute at issue here, the prosecutor in *Williams* filed an affidavit of prejudice and sought reassignment of the case. The defendant challenged the affidavit of prejudice, claiming that *Batson* should also apply to the peremptory removal of judges and that the prior finding of improper motive in the prosecutor's use of jury peremptories gave rise to the inference that his peremptory removal of the judge was likewise based on racial bias. *Id.* at 709-10.

In rejecting the *Batson* analogy offered by the defendant and urged here by Clover Park, the court stated, "Far from compelling, the analogy between peremptory challenges to prospective jurors and to judges is attenuated, so much so that the appropriateness of the analysis and procedures in *Batson* and [*People v. Wheeler*, 22 Cal.3d 258 (1978)] to [statutory] peremptory challenges [to judges] is hardly self-evident." *Id.* at 704, *see also id.* at 703-04 (a peremptory challenge to the judge is "not analogous to a peremptory challenge to a prospective juror.").

While rejecting the *Batson* analogy, *Williams* did apply an equal protection test to the peremptory challenge

at issue. *Id.* at 708. Under *Williams*, the party alleging that another party's peremptory removal of a judge was made

> solely on the ground of group bias bears an initial burden of establishing a prima facie case of invidious discrimination; if a prima facie case is established, the adversary then assumes the burden of demonstrating that the preemptory challenge was not predicated on group bias alone; if the adversary offers a race-neutral basis for the peremptory challenges, the trial court determines whether or not the charging party, here the defendant, has established purposeful discrimination.

Id. at 708 (citations omitted). *Williams* also explained in no uncertain terms that such review is not "mandated whenever the opposing party nakedly asserts that challenge to a judge was race-based." *Id.* at 707.

Under this analysis, which Clover Park urges the Court to adopt, the challenging party must make a prima facie showing of "facts and any other relevant circumstances which raise an inference that the [other party] excluded the judge on account of his race." *Id.* at 708-09. Thus, *Williams* requires as a threshold matter evidence of purposeful or intentional discrimination in the use of a peremptory removal. *Id.* at 708. Likewise, the "party charging that his adversary has used a [peremptory] challenge in a manner violating equal protection bears the burden of proving purposeful discrimination." *Id.* Contrary to Clover Park's assertions, Pet. at 7, the instant case does not conflict with *Williams*, as Clover Park failed to make a threshold showing of racial discrimination.

Because the record in this case does not indicate that Steilacoom's affidavit of prejudice was filed for an improper purpose, this Court should not reach the constitutional issue of whether or not state courts should undertake a *Batson* or *Williams*-type inquiry into the disqualification of trial judges when an opposing party can make such a showing. *See, e.g., State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918, 70 S.Ct. 252 (1950) (identifying poor record as potential basis for declining to issue a writ of certiorari).

Clover Park failed, under any formulation of equal protection principles, to make out a prima facie case of improper motive on Steilacoom's part. Clover Park's own description of its entire prima facie case of racial bias demonstrates that it fails to meet the standards it urges this Court to adopt:

> . . . the case is one in which issues of race and discrimination against minority students is important; Judge Grant is African-American; and Steilacoom offers no justification at all for asserting that Judge Grant is prejudiced toward Steilacoom and its counsel.

Pet. App. Q at 106a. As to Clover Park's first allegation, every tribunal to consider Clover Park's discrimination argument has rejected it, because Clover Park mustered no evidence of either adverse impact or discriminatory intent with regard to the boundary adjustment. *See* Pet. App. C at 26a-27a ("There is no Record evidence to support Clover Park's assertion that the transfer would exacerbate existing racial or economic divisions . . . nor does the Record reflect racially segregative intent."); Pet. App. B at 10a (Court of Appeals rejecting claim due to lack of evidence of disparate impact). Particularly given the absence

of any evidentiary support, Clover Park's bare assertion that race issues are central to its substantive case cannot and should not give rise to an inference of improper motive.

Next, Clover Park suggests that a reviewing court may infer a racially improper motive from the mere fact that a party has filed an affidavit of prejudice against an African-American trial judge. Pet. at 9. If that fact alone were sufficient to trigger further review, any removal of a judge from a racial minority group would be suspect and subject to additional scrutiny. *Cf. Williams*, 8 Cal. App.4th at 707 (inquiry into removal is not "mandated whenever the opposing party nakedly asserts that challenge to a judge was race-based."). *See also Batson*, 476 U.S. at 101 (White, J., concurring) ("it is not unconstitutional, without more, to strike one or more blacks from the jury"). In *Williams*, the court found that the group identities of excluded African-American women jurors and of the male African-American judge removed by the affidavit of prejudice were not sufficiently coextensive to raise an inference of a pattern of racial decision-making. 8 Cal. App.4th at 710. Here, the overlap between the group identity of a female African-American judge and the Clover Park School District (or, alternatively, its student body, comprising both majority and minority students from a variety of diverse backgrounds), is nonexistent. The fact that Judge Grant is African-American does not give rise to a presumption of discriminatory intent.

Finally, as both the trial court and the Court of Appeals noted, "a party may file an affidavit of prejudice as a matter of right without any further showing." Pet. App. B at 20a (Court of Appeals opinion). Steilacoom's affidavit and motion undisputedly complied with the statute.

Where no further explanation of the perceived prejudice is required by the statutory provisions, the *absence* of such additional explanation of Steilacoom's grounds for filing in its original affidavit of prejudice cannot give rise to an inference of discrimination. Clover Park's citation of *Johnson v. California*'s "unlikely hypothetical" footnote, which explained that if a challenging party makes out a prima facie case of discrimination, the other party's refusal to explain use of a peremptory may further support the inference of discrimination, is not on point. Pet. at 11 (citing 545 U.S. 162, 171 n. 6, 125 S.Ct. 2410). *Johnson* does not suggest that silence alone is sufficient to establish a prima facie case. When challenged, Steilacoom gave ample non-race-related justifications for its actions. The fact that these were not contained in its original affidavit (which was not required and would not have been appropriate) cannot be evidence of discriminatory intent.

As its basis for challenging Steilacoom's affidavit of prejudice, Clover Park offers its own speculation and two race-neutral epithets ("baloney" and "bravado") that Steilacoom's counsel used to describe Clover Park's constitutional claims, claims that three levels of Washington courts have since rejected. *See* Pet. App. Q at 106a; Pet. App. J at 74a. This "evidence" does not remotely suggest that Steilacoom had an improper racial motive in filing its affidavit of prejudice, and it is substantially more tenuous than the assertion of race-based decision-making rejected in *Williams*. 8 Cal. App.4th at 707.

Unlike the *Batson* cases on which Clover Park relies, there is no evidence here of a pattern of race-based decision-making. *Compare, e.g., Miller-El v. Dretke*, 545 U.S. 231, 236, 254, 255-56, 261, 125 S.Ct. 2317 (2005) (significant evidence of prosecutorial misconduct, including use of

peremptory strikes against 10 of 11 qualified African-American potential jurors (91%), suspicious and unexplained use of a "jury shuffle" to reorder the venire panel on several occasions, different descriptions of the death penalty used with questioning of African-American jurors versus white jurors, and deliberately incomplete questions on minimum sentencing posed to African-American jurors in an attempt to create for-cause strikes); *Batson*, 476 U.S. at 83 (1986) (prosecutor struck all African-Americans from venire); *Johnson*, 545 U.S. 162 (prosecutor struck all potential African-American jurors) (all cases cited by Clover Park, Pet. at 8). Clover Park's allegations do not meet the standards for a prima facie showing established by these cases.[5]

Even if Clover Park's accusations could meet the threshold showing for an equal protection inquiry, Steilacoom responded to Clover Park's challenge by explaining its decision to submit an affidavit of prejudice. *See* Pet. App. M at 93a-94a (sworn declaration of counsel explaining that affidavit was based on experience of Judge Grant's private practice and her previous practice of suing school districts for malfeasance); Pet. App. N at 95a-96a (sworn declaration of Steilacoom's Superintendent also recounting experience with Judge Grant's prior private practice). *See also* Pet. App. I at 64a (statement of counsel at oral argument). All record evidence indicates that Steilacoom's prior experience with Judge Grant during her years of private practice was the basis of the affidavit of prejudice, not the Judge's race. Judge Armijo, the trial

[5] Indeed, Steilacoom had at least one other case pending before Judge Grant, a case in which Steilacoom's conduct was not at issue and in which it did not file an affidavit of prejudice. Pet. App. N at 96a.

judge assigned to hear Clover Park's motion, reviewed the parties' submissions and oral argument and found no basis to vacate the reassignment. *See* Pet. App. I at 72a-73a (oral ruling); Pet. App. H (order). There is no basis to overturn the trial court's ruling.[6]

Unable to prove a prima facie case, Clover Park insists that Steilacoom's race-neutral explanation is inadequate because Steilacoom's *counsel* never swore under oath that race was not a factor in the decision to file an affidavit of prejudice. Pet. at 10. Clover Park ignores the fact that Steilacoom did make such a sworn statement. *See* Pet. App. I at 64a (Steilacoom provided the trial court and counsel with a second sworn declaration of Steilacoom's superintendent that affirmed that Judge Grant's race was not a factor in the decision to file an affidavit of prejudice). Clover Park's contention that *Batson* or *Williams* requires something in addition to or different from the explanations Steilacoom provided is unfounded. *Hernandez v. New York*, 500 U.S. 352, 360, 114 L.Ed.2d 395 (1991) (regarding the validity of an explanation for exercise of a peremptory, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

---

[6] Even if Clover Park could make out a constitutional challenge on the record of this case, it is not at all clear that its requested relief (vacation of the trial court's substantive ruling and remand) is appropriate. As noted, this matter came before the trial court as an administrative appeal. Pet. App. V. The Court of Appeals subsequently reviewed the trial court's ruling on a de novo basis. Pet. App. B at 8a (Court of Appeals conducted same inquiry as trial court). Thus, Clover Park has already had the benefit of a second full review of its substantive allegations.

Contrary to Clover Park's repeated assertions, this case does not concern "motions of prejudice that are based on openly stated racial bias . . . ". Pet. at 8. There is no evidence suggesting that the right to file an affidavit of prejudice was misused here or that a ruling setting a new standard for the review of such affidavits is necessary. There is no need for the Court to reach the constitutional issues that Clover Park presses here, as the record contains no facts that might trigger such constitutional analysis. There being no basis to reverse the trial court's order, Clover Park's request for review should be denied.

2. Washington's Statutory Provisions Limiting the Admission of New Evidence During an APA Appeal Do Not Violate Due Process.

After filing its petition for review in the trial court under Washington's APA, Clover Park sought discovery from Steilacoom and the two administrative agencies. CP 233-43; 301-09; 442-49. Those parties objected, and the trial court quashed the discovery requests after receiving briefing[7] and argument on the issue. Pet. App. D & E (orders). The trial court's refusal to allow Clover Park to engage in discovery was reviewed for abuse of discretion by the Court of Appeals. *Washington Indep. Tel. Ass'n v. Washington Util. & Trans. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002); *see also Penberthy Electromelt v. U.S. Gypsum*, 38 Wn. App. 514, 521, 686 P.2d 1138 (1984). The Court of Appeals found no error. Pet. App. B at 18a-19a. The Washington Supreme Court declined further review. Clover Park now claims that the orders quashing

[7] The Motions to Quash are in the record at CP 222-60 & 297-317.

that discovery were unconstitutional and asks this Court to review its discovery dispute. Pet. at 11.

Under Washington law, an APA appeal is generally limited to the agency record. RCW 34.05.558. "A court may take evidence in addition to the agency record only if it relates to the validity of the agency action and is needed to decide disputed issues regarding improper agency action, unlawfulness of procedure, or material facts not required to be determined on the agency record." *Washington Indep. Tel. Ass'n*, 110 Wn. App. at 518 (trial court did not abuse discretion by deciding case on administrative record rather than allowing additional discovery); *see also* RCW 34.05.562(1) (explaining limited grounds on which court may determine that additional evidence is appropriate). This is hardly a radical notion: the federal Administrative Procedure Act has similar provisions. *See* 5 U.S.C. § 706 (limiting judicial review, with certain exceptions, to agency record). The fact that review of an agency decision is conducted on the administrative record that was before that agency is consistent with accepted appellate principles and is not constitutionally troubling. "'[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743, 105 S.Ct. 1598 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241 (1973)).

Clover Park argues that the trial court abused its discretion by denying Clover Park the opportunity to seek discovery on its alleged constitutional claims. Pet. at 13-14. But this case does not implicate any student's right to receive a public education or any individual personal or property rights. Rather, the issue before the administrative agency was whether common boundary line between

two public school districts should be adjusted – all eligible students will attend one of the two districts under any scenario. Clover Park had the opportunity before the Regional Committee to submit evidence, testimony, and argument in support of its claims that the boundary adjustment was somehow unconstitutional. It failed to provide evidence of either disparate impact or discriminatory intent. *See* Pet. App. C at 26a-27a ("There is no Record evidence to support Clover Park's assertion that the transfer would exacerbate existing racial or economic divisions . . . nor does the Record reflect racially segregative intent."); Pet. App. B at 10a (Court of Appeals rejects claim due to lack of evidence of disparate impact). Failure to make a factual record in support of one's claims is not good cause for the admission of additional evidence on appeal. *See* RCW 34.05.558.

Clover Park does not contend that it met the APA's standards, or that the trial court misapplied the law. In essence, Clover Park claims that the APA's limits on the admission of new evidence violate due process. To make out such a claim, however, Clover Park would face a substantial burden of proof under Washington law. *See, e.g., Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998) (Washington statutes are presumed constitutional). It has not come close to meeting that burden, either here or in its briefing to prior courts.

Clover Park also claims that it needed discovery to address Steilacoom's "new" defense to its constitutional challenges. Pet. at 14. This defense admittedly consisted solely of Steilacoom's legal argument that Clover Park had failed to muster evidence of the two elements necessary to prevail on its constitutional claim, namely disparate impact and intentional discrimination. *Id.* Clover Park's

attempt to demand – as a constitutional right – discovery during the appeal phase of its litigation because it failed to create an administrative record to support its claims is circular and should be rejected.

Clover Park next invokes the inherent power of the trial court under the Washington State Constitution to review constitutional claims as an independent ground for granting discovery. *Id.* at 12, *see also* Pet. App. V at 123a. Clover Park's reliance on the trial court's inherent power is itself an admission that neither Chapter 28A.315 RCW (governing the organization of school districts and boundary changes) nor Chapter 34.05 RCW (the APA) support disregarding the limited administrative review of this matter.

Moreover, a trial court's exercise of its inherent authority to review claims, where applicable, is also limited to the administrative record under Washington law. "Judging whether [an agency's] decision was arbitrary and capricious requires an evaluation of the evidence produced at hearing." *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) (reversing trial court's decision pursuant to constitutional writ of certiorari that civil service commission decision was arbitrary and capricious, where the evidence produced at the administrative hearing did not support finding); *Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986) ("review by 'constitutional' or 'common law' certiorari is not full appellate review on the merits. It is limited to a review of the record below . . . ") (citation omitted); *Barrington v. Eastern Washington Univ.*, 41 Wn. App. 259, 263, 703 P.2d 1066 (1985) ("Review is limited to the record of the administrative tribunal."). Thus, there is no basis in either the

governing statutes or the trial court's inherent authority to demand civil discovery during an appeal.

Clover Park asserts that the trial court's orders quashing discovery deprived it of the ability to investigate its speculative claim that the Regional Committee may have discussed the boundary adjustment petition outside of public hearings. Pet. at 13. This contention, too, is meritless.

Clover Park's belated procedural claim did not warrant circumvention of the APA's strict limitations on the addition of new evidence. *See* RCW 42.17.562. Clover Park could have raised and sought timely relief for alleged Open Public Meeting Act violations prior to the completion of the proceedings before the Regional Committee. RCW 42.30.130. Clover Park concedes that the "evidence" of contact among Committee members was "discovered" on the record at the March 3, 2004 Committee hearing. Appellant's Opening Brf. to Court of Appeals at 40. At that meeting, Clover Park could have raised its challenge directly with the Committee and sought a continuance of the hearing to explore its alleged concerns or sought relief pursuant to RCW 42.30.130. Alternatively, Clover Park could have requested public records from the Committee and raised its concerns about procedural violations before the State Board. Clover Park chose to do neither. Instead, Clover Park tried to use speculation about Committee practices as a basis to seek discovery from all responding parties, notwithstanding the limitations of RCW 34.05.562 upon the introduction of new evidence. Pet. App. F at 39a-41a.

Clover Park failed to explain to the trial court how its requests were necessary to its appeal or how they fit

within the APA's provisions. As the Court of Appeals noted, "Clover Park has made no offer of proof as to what information it hoped to add to the record." Pet. App. B at 19a. Further, Clover Park responded to Steilacoom's dispositive motion – and filed its own motions for summary judgment – without recourse to the discovery it now claims to need. The trial court properly exercised its discretion to reject Clover Park's attempt to circumvent RCW 34.05.562. Clover Park's request that this Court review the trial court's orders quashing discovery should be denied.

CONCLUSION

The trial court properly refused to vacate the order reassigning this case to a new trial judge and acted well within its discretion in reviewing this APA appeal upon the administrative record. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHRISTOPHER L. HIRST*
LAURA K. CLINTON
CARLOS CHAVEZ
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
Telephone: 206-623-7580

Attorneys for Respondent Steilacoom Historical School District No. 1

**Counsel of Record*

April 5, 2007

Wash. Rev. Code 4.12.040
Prejudice of judge, transfer to another department, visiting judge – Change of venue generally, criminal cases.

(1) No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court. In all judicial districts where there is only one judge, a certified copy of the motion and affidavit filed in the cause shall be transmitted by the clerk of the superior court to the clerk of the superior court designated by the chief justice of the supreme court. Upon receipt the clerk of said superior court shall transmit the forwarded affidavit to the presiding judge who shall direct a visiting judge to hear and try such action as soon as convenient and practical.

(2) The presiding judge in judicial districts where there is more than one judge, or the presiding judge of judicial districts where there is only one judge, may send a case for trial to another court if the convenience of witnesses or the ends of justice will not be interfered with by such a course and the action is of such a character that a change of venue may be ordered: PROVIDED, That in criminal prosecutions the case shall not be sent for trial to any court outside the county unless the accused shall waive his right to a trial by a jury of the county in which the offense is alleged to have been committed.

Wash. Rev. Code 4.12.050
Affidavit of prejudice.

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

Wash. Rev. Code 34.05.510
Relationship between this chapter and other judicial review authority.

This chapter establishes the exclusive means of judicial review of agency action, except:

(1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

(3) To the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law.

Wash. Rev. Code 34.05.554
Limitation on new issues.

(1) Issues not raised before the agency may not be raised on appeal, except to the extent that:

(a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;

(b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;

(c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or

(d) The interests of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

Wash. Rev. Code 34.05.558
Judicial review of facts confined to record.

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.

Wash. Rev. Code 34.05.562
New evidence taken by court or agency.

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

(b) Unlawfulness of procedure or of decision-making process; or

(c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

(2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(c) The agency improperly excluded or omitted evidence from the record; or

(d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

FILED
APR 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-1215

In the

Supreme Court of the United States

October Term, 2006

Clover Park School District No. 400 of Pierce County, Washington,
Petitioner,

v.

Washington State Board of Education; Puget Sound Educational Service District Regional Committee on School District Organization; and Stellacoom School District No. 1 of Pierce County, Washington,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

PETITIONER'S REPLY BRIEF

Michael W. Hoge
Counsel of Record
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
206.359.8000
Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

I. Equal Protection and Peremptory Judge Removal 1

II. Due Process, Discovery, and the Opportunity to Present Claims and Address Defenses 6

III. Conclusion 10

TABLE OF AUTHORITIES

Cases

Parents Involved in Community Schools v. Seattle School District No. 1, 149 Wash. 2d 660, 72 P.3d 151 (2003) 3

Seattle School District, et al. v. State, Thurston County Superior Court No. 81-2-1713-1, Findings of Fact 17.1, 17.2, 17.3, Conclusions of Law 54 (September 7, 1983) 2

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 4

Statutes

RCW 28A.315.205 ..... 2, 7

RCW Ch. 34.05 7

RCW Ch. 42.30 ..... 6, 8

Regulations and Rules

FED. R. CIV. P. 18 8

FED. R. EVID. 103 9

WASH. R. CIV. P. 18 8

WASH. R. EVID. 103 9

Constitutional Provisions

WASH. CONST. art. I, § 12 & art. IX, §§ 1, 2 7

TABLE OF APPENDICES

Appendix HH -- RCW Ch. 28A.315 as it Existed at the Time of the Regional Committee Hearing.....293a

Petitioner Clover Park School District (Clover Park) respectfully submits this reply to respondent Steilacoom School District's (Steilacoom's) April 5, 2007 Brief in Opposition (hereafter, Resp. Brief).

I. Equal Protection and Peremptory Judge Removal

Regarding Steilacoom's motion and affidavit of prejudice against the original African-American trial court judge, Steilacoom understates the extent to which it evaded and "trashed" Clover Park's constitutional arguments, before both the Regional Committee and State Board, as Clover Park sought to protect its high-minority, high-poverty student body from the undisputed racially segregative effects, and undisputed economic damage, of Steilacoom's proposed territory transfer.

As noted in Clover Park's Petition, and contrary to Steilacoom's indication that there was "no Record evidence to support Clover Park's assertion that the transfer would exacerbate existing racial or economic divisions," Resp. Brief at 12, the *only* evidence related to pupil segregation before the Regional Committee was Clover Park's uncontested statements,[1] submitted in advance of the hearings in which Steilacoom could have disagreed, that the proposed transfer would exacerbate racial and socioeconomic isolation.

---

[1] "The proposed transfer would increase the existing economic, social and racial imbalance between the two districts." AR 345. "It is not seriously disputed, and is apparent both from the record and from readily-available official information...[that] the proposal would exacerbate rather than improve existing patters of student ethnic distribution (note, e.g., that Clover Park's minority student population is substantially higher than Steilacoom's, that Clover Park has the second-highest African-American student percentage of all districts in the state...)". AR 110-14.

Steilacoom neither addressed nor contested this obvious effect of the proposed transfer before the Regional Committee, except to assert—once Clover Park was represented by counsel for the third and final Regional Committee session on March 3, 2004, and had repeated Clover Park's earlier information that the transfer would be segregative[2]—that Clover Park's raising of that and other constitutional considerations was "baloney." And only before the State Board of Education did Steilacoom first contend, in the course of labeling Clover Park's constitutional claims as "bravado," that Clover Park's argument against the worsened racial segregation caused by the territory transfer should fail because no direct evidence of segregative purpose had been presented to the Regional Committee.

Respondents are familiar with the 1983 Washington trial court decision[3] that racially segregated schools are

---

[2] Clover Park was not represented by counsel at the first two of the Regional Committee's sessions held on November 5 and 25, 2003. The Regional Committee did not discuss constitutional issues in reaching its preliminary decision at the meeting of November 25, and did not address them at its March 3, 2004 meeting even after they had been explicitly raised by counsel for Clover Park. Counsel for the Regional Committee steadfastly declined, just as the Regional Committee had, to even use the word "constitution" in any of the Regional Committee's papers filed before the courts below. (The Regional Committee's hearing was still pending as of March 3, 2004. RCW 28A.315.205(2), App. HH, p. 309a *infra*. Otherwise, the Regional Committee's preliminary determination of November 25, 2003 was not converted to written findings and conclusions in timely fashion, and the State Board would have had to refer the matter back to the Regional Committee to rehear the matter, RCW 28A.315.205(5)(a)(2), *id.*, p. 311a *infra*.)

[3] *Seattle School District, et al. v. State*, Thurston County Superior Court No. 81-2-1713-1, Findings of Fact 17.1, 17.2, 17.3, Conclusions of Law 54 (September 7, 1983): "A racially segregated education is inadequate to equip students, especially minority students, with basic educational skills and with the ability to participate effectively in our open political

unconstitutional under the Washington Constitution without regard to the cause of the segregation. Mere months before the Regional Committee's apparent closed-door decision not to consider this and other constitutional defects of the territory transfer, and a year before the State Board of Education's decision that it would not consider constitutional issues because its role was so narrowly limited compared with normal administrative hearings, the Washington Supreme Court commented on "Washington's unique approach to the State's paramount duty to provide a general and uniform basic education to all children regardless of race, color, caste, or sex," *Parents Involved in Community Schools v. Seattle School District No. 1*, 149 Wash. 2d 660, 72 P.3d 151, 162 (2003). The court made clear that the issue of whether discriminatory purpose is a necessary element of a state constitutional violation in the context of public school racial segregation remains open:

> [I]f it is determined that in a contemporary setting de facto segregated schools cannot provide children with the educational opportunities necessary to equip them for their role as citizens, then the state constitution would most certainly mandate integrated schools.

Id., 72 P.3d at 162-63.

Clover Park reminded the State Board of those cases, AR 100-01, and it was in that context that

---

system and in the labor market. Compared to their counterparts from segregated schools, minority students from desegregated schools experience significant gains in basic skills achievement, advance further through school, more frequently obtain college degrees, have significantly higher employment rates and income, and participate more actively and effectively in the political process. Desegregation significantly improves racial attitudes and behavior of both minority and majority students. Segregated schools are prohibited by Article IX, Section 1 of the Constitution."

Steilacoom characterized Clover Park's constitutional input as "bravado" and first argued its "no segregative purpose" defense to the segregative effects of the proposal.

Clover Park noted Steilacoom's persistence in placing pejorative labels on Clover Park's segregation and school funding arguments while failing to respond to them, AR 92 (prehearing brief to State Board). But Steilacoom still did not respond to the substance of those contentions. AR 3-88 (transcript of June 18, 2004 State Board hearing).

After the State Board declined to consider Clover Park's constitutional issues, saying those issues were "best addressed by the courts," Pet. App. W at 124a, Steilacoom's contemptuous non-responses were about to be placed before Judge Grant.

Clover Park has never maintained that it knows Steilacoom's sole reason for its motion and affidavit of prejudice was that Judge Grant is African-American. Rather, Clover Park has consistently asserted that race was among the reasons for Steilacoom's peremptory action, and that there has been no proper evidentiary indication the removal would have occurred even in absence of the racial consideration. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n. 21 (1977). Steilacoom's continued insistence that it had non-racial reasons, even if true, does not end the inquiry.

Steilacoom's contention that the filer of its motion and affidavit had no racial motivation at all for removal of Judge Grant is less plausible than the alternative. After it ridiculed Clover Park's attempts to have the constitution considered in a case involving claims of pupil segregation and funding inequality affecting a high-minority, high-poverty school system, after it claimed before the State

Board that only federal and not state constitutional concepts are applicable, and after the State Board refused to consider constitutional matters, saying they were for the courts, Steilacoom's potential downside before Judge Grant was obvious enough that its motion and affidavit were no surprise.

Steilacoom could have acknowledged what would occur to most normal citizens—namely, that ridiculing Clover Park's arguments, yet not responding to them in spite of their apparent substance, might especially offend an African-American judge—while still asserting under oath that other, non-racial considerations predominated and would have led to the same decision even in absence of the racial one.

It is true, of course, that applying the Equal Protection Clause to peremptory removal of judges cannot be done in exactly the same way as with peremptory removal of jurors. It is equally true that failure to apply the Equal Protection Clause at all would permit even openly-racist reasons for removing a judge to escape scrutiny altogether. Situations of openly-stated racial motivation are bound to be rare, and the sorts of patterns that may be discerned with jury selection are not available with single-judge peremptory challenges. For these reasons, the totality of this case's factual basis for questioning a party's peremptory judge removal; the party's shifting explanations for its reasons; and the party's failure to directly refute, in response to an explicit invitation, through the sworn statement of the person filing the peremptory removal, that race was a factor in its decision (or to acknowledge that it was, but then testify that the same decision would have been made in absence of the racial consideration), is enough to demonstrate a race-based reason for the peremptory removal.

II. Due Process, Discovery, and the Opportunity to Present Claims and Address Defenses

The State Board, taking the narrowest view possible of its purview, Pet. App. W at 124a, chose not to address constitutional considerations at all, indicating they were "best addressed by the courts," *id.* at 126a. Steilacoom now asserts the courts may not address the constitutional issues—not even the "no segregative purpose" defense first raised by Steilacoom after the Regional Committee's decision--because they have already been considered in the "APA process" and consideration of further evidence developed outside the "record" is not appropriate.

Steilacoom further argues that Clover Park's assertion of a due process right to normal civil discovery, regarding (a) its Open Public Meetings Act (OPMA) claims concerning the decisionmaking process of the Regional Committee, (b) its constitutional claims concerning the racial and economic effects of the territory transfer at issue, and (c) Steilacoom's defense of lack of segregative purpose, should fail because Clover Park could have developed its proof regarding the OPMA issue during the Regional Committee hearing, because the state APA limits new evidence, and because Clover Park did not make an "offer of proof" as to what its requested discovery would reveal. Resp. Brief at 17-22.

As noted in the Petition, Clover Park separately pleaded its OPMA and constitutional claims, *i.e.*, Clover Park claimed that the results of the Regional Committee/State Board process were invalid because the Regional Committee violated the OPMA, RCW Ch. 42.30, and because the proposed transfer, if effected, would violate the Washington Constitution's equal protection and

education provisions, WASH. CONST. art. I, §12 & art. IX, §§ 1, 2.

The reasons are rather straightforward for Clover Park's refusal to be confined to the "administrative record."

First, as indicated in its decision, the State Board viewed its role as reviewing the record from the Regional Committee only in light of the factors set forth in RCW 28A.315.205(5)(a)(ii), App. HH, p. 311a *infra*. The process followed in this matter is a far cry from the full-dress administrative processes in Washington's APA, RCW Ch. 34.05, and in Steilacoom's cited authorities. *See* Pet. App. F at 38a.

Thus, the reason for Clover Park's separate and independent pleading of its OPMA, constitutional, and other claims, Pet. App. at 123a, was to guarantee that its full case—matters that were considered in the Regional Committee and State Board processes, as well as matters that were not—would be heard. Clover Park's joinder of its "administrative" and "non-administrative" claims was for the sole purpose (there can be no other[4]) of assuring that its OPMA and constitutional claims received the same scrutiny as if they had been filed in a separate lawsuit.

Under Steilacoom's theory, the State Board can state expressly that it is not considering constitutional matters because they are "best addressed by the courts," and then those same constitutional issues may be turned away by the courts on the grounds that they were not developed in the administrative process and no further

---

[4] This, of course, is why Clover Park sought court review of the decision to transfer territory as a "Petitioner/Plaintiff," Pet. App. V at 115a, and not simply as a petitioner seeking review of an administrative record. *See also* Pet. App. G at 44a.

review is available—even where all the "administrative" actors declined urgings that they consider those issues.[5]

Second, Clover Park lacked meaningful opportunity to develop its OPMA claims in the administrative process. Doing so would have required filing a separate lawsuit, even though there was and is no reason to suppose an OPMA claim could not be made as a separate claim in Clover Park's appeal. WASH. R. CIV. P. 18; *cf.* FED. R. CIV. P. 18.

No amount of "public records" requests, Resp. Brief at 21, could substitute for interrogatories, requests for admission, and requests for production directed to, as well as depositions of, members of the Regional Committee, or of its executive (who indicated by declaration his unfounded belief that only substantive, and not procedural, matters were covered by the OPMA, CP 369. *Cf.* RCW Ch. 42.30).[6]

Third, as to properly-pleaded OPMA and constitutional claims, one normally develops evidence through discovery and then attempts to offer it to the

---

[5] The court of appeals was not quite so absolute, indicating that the State Board should not ignore constitutional claims if the decision complained of was motivated by "flagrant racism," but, because "Clover Park has not provided evidence of blatant racism, this is not an issue." Pet. App. B at 18a. This rather high bar for triggering constitutional scrutiny has no parallel elsewhere in the law, and is all the more striking where normal civil discovery on independently-pleaded constitutional claims has not been permitted.

[6] If respondents believed Clover Park's separately-pleaded, non-administrative claims were not properly joined to the claims made in Clover Park's appeal from the decisions of the Regional Committee and State Board, they could have and should have moved for their severance rather than stipulating to consolidation of all pending claims.

tribunal. If the evidence is not admitted, an offer of proof may be made, but is not always required, to protect the record on appeal. WASH. R. EVID. 103; *cf.* FED. R. EVID. 103.

Here, Clover Park was not permitted to develop the evidence, and thus could not make indications of proof beyond the then-known facts—all of which were placed directly into the record, not objected to, and not excluded from the evidence. Clover Park provided evidence of the information it had--the Regional Committee executive's indication under oath of his belief that "procedural matters" were not covered by the law; the inexplicable changes in the content of the Regional Committee's November 25, 2003 oral decision and its written March 25, 2004 decision; the apparent pre-understanding, based on acknowledged pre-hearing communication among Regional Committee members, to ignore Clover Park's constitutional claims at the March 3 meeting; and the Regional Committee's delaying tactics as to pending Clover Park records requests directed toward the OPMA issue. And Clover Park explained why it needed discovery to develop the additional evidence. Pet. Apps. F & G at 35-46a.

Similarly, as to its constitutional equal protection, school desegregation, and school funding claims and Steilacoom's asserted "no segregative purpose" defense, Clover Park fully explained its theories, and the need for discovery to prepare to present its proof, Pet. App. F & G at 35-46a; CP 318-65, 382-86, & 394-97.

Moreover, the day after the trial court's orders to quash Clover Park's discovery—which orders permitted Clover Park to apply for permission to conduct discovery—Clover Park moved for such permission, Pet. App. GG at 288-90a, and placed much of its written

discovery before the court for examination, CP 460-569. That motion was not heard before the trial court granted Steilacoom's motion for summary judgment, ruling that Clover Park could not go outside the "administrative record" even as to its claims that the transfer would violate the Washington Constitution. The trial court's order granting summary judgment did not even mention Clover Park's OPMA claim, and did not address the effect of Clover Park's separately pleaded claims. Pet. App. C at 21-29a.

III. Conclusion

Based on the foregoing, Clover Park submits the Petition for Certiorari should be granted.

RESPECTFULLY SUBMITTED this 18th day of April, 2007.

Michael W. Hoge
Counsel of Record
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
206.359.8000
Attorneys for Petitioner
Clover Park School District

APPENDIX

APPENDIX HH – RCW CH. 28A.315 AS IT EXISTED AT TIME OF REGIONAL COMMITTEE HEARING

Chapter 28A.315 RCW
ORGANIZATION AND REORGANIZATION OF SCHOOL DISTRICTS

RCW 28A.315.005 Governance structure. (1) Under the constitutional framework and the laws of the state of Washington, the governance structure for the state's public common school system is comprised of the following bodies: The legislature, the governor, the superintendent of public instruction, the state board of education, the educational service district boards of directors, and local school district boards of directors. The respective policy and administrative roles of each body are determined by the state Constitution and statutes.

(2) Local school districts are political subdivisions of the state and the organization of such districts, including the powers, duties, and boundaries thereof, may be altered or abolished by laws of the state of Washington.

RCW 28A.315.015 Purpose—Policy. (1) It is the purpose of this chapter to:

(a) Incorporate into a single, comprehensive, school district organization law all essential provisions governing:

(i) The formation and establishment of new school districts;

(ii) The alteration of the boundaries of existing districts; and

(iii) The adjustment of the assets and liabilities of school districts when changes are made under this chapter; and

(b) Establish methods and procedures whereby changes in the school district system may be brought about by the people concerned and affected.

(2) It is the state's policy that decisions on proposed changes in school district organization should be made, whenever possible, by negotiated agreement between the affected school districts. If the districts cannot agree, the decision shall be made by the regional committees on school district organization, based on the committees' best judgment, taking into consideration the following factors and factors under RCW 28A.315.205:

(a) A balance of local petition requests and the needs of the statewide community at large in a manner that advances the best interest of public education in the affected school districts and communities, the educational service district, and the state;

(b) Responsibly serving all of the affected citizens and students by contributing to logical service boundaries and recognizing a changing economic pattern within the educational service districts of the state;

(c) Enhancing the educational opportunities of pupils in the territory by reducing existing disparities among the affected school districts' ability to provide operating and capital funds through an equitable adjustment of the assets and liabilities of the affected districts;

(d) Promoting a wiser use of public funds through improvement in the school district system of the educational service districts and the state; and

(e) Other criteria or considerations as may be established in rule by the state board of education.

(3) It is neither the intent nor purpose of this chapter to apply to organizational changes and the procedure therefor relating to capital fund aid by nonhigh school districts as provided for in chapter 28A.540 RCW.

RCW 28A.315.025 Definitions. As used in this chapter:

(1) "Change in the organization and extent of school districts" means the formation and establishment of new school districts, the dissolution of existing school districts, the alteration of the boundaries of existing school districts, or all of them.

(2) "Regional committee" means the regional committee on school district organization created by this chapter.

(3) "State board" means the state board of education.

(4) "School district" means the territory under the jurisdiction of a single governing board designated and referred to as the board of directors.

(5) "Educational service district superintendent" means the educational service district superintendent as provided for in RCW 28A.310.170 or his or her designee.

Appendix HH

RCW 28A.315.035 Organization of school districts. A school district shall be organized in form and manner as hereinafter in this chapter provided, and shall be known as . . . . . (insert here the name of the district) School District No. . . . ., ... county, state of Washington: PROVIDED, That all school districts now existing as shown by the records of the educational service district superintendent are hereby recognized as legally organized districts: PROVIDED FURTHER, That all school districts existing on April 25, 1969 as shown by the records of the county or intermediate district superintendents are hereby recognized as legally organized districts.

RCW 28A.315.045 Reorganization. (1) A new school district may be formed comprising contiguous territory lying in either a single county or in two or more counties. The new district may comprise:

(a) Two or more whole school districts;

(b) Parts of two or more school districts; and/or

(c) Territory that is not a part of any school district if such territory is contiguous to the district to which it is transferred.

(2) The boundaries of existing school districts may be altered:

(a) By the transfer of territory from one district to another district;

(b) By the consolidation of one or more school districts with one or more school districts; or

(c) By the dissolution and annexation to a district of a part or all of one or more other districts or of territory that is not a part of any school district: PROVIDED, That such territory shall be contiguous to the district to which it is transferred or annexed.

(3) Territory may be transferred or annexed to or consolidated with an existing school district without regard to county boundaries.

RCW 28A.315.055 Conflicting or incorrectly described school district boundaries. In case the boundaries of any of the school districts are conflicting or incorrectly described, the educational service district board of directors, after due notice and a public hearing, shall change, harmonize, and describe them and shall so certify, with a complete transcript of boundaries of all districts affected, such action to the state board for its approval or revision. Upon receipt of notification of state board action, the educational service district superintendent shall transmit to the county legislative authority of the county or counties in which the affected districts are located a complete transcript of the boundaries of all districts affected.

RCW 28A.315.065 District boundary changes—Submission to county auditor. (1) Any district boundary changes shall be submitted to the county auditor by the educational service district superintendent within thirty days after the changes have been approved in accordance with this chapter. The superintendent shall submit both legal descriptions and maps.

(2) Any boundary changes submitted to the county auditor after the fourth Monday in June of odd-

numbered years does not take effect until the following calendar year.

RCW 28A.315.075 Effect of 1999 c 315—Existing provisions not affected. (1) Any proposed change in school district organization initiated before July 25, 1999, shall be considered under the laws and rules in effect before July 25, 1999. Chapter 315, Laws of 1999 applies to any proposed change in school district organization initiated on or after July 25, 1999.

(2) For purposes of this section, "initiated" means the filing of a petition, the motion of a school board, or the report of an educational service district. This section does not preclude the filing of a new petition on or after July 25, 1999, where the same or a similar proposal was filed before July 25, 1999.

RCW 28A.315.085 Personnel and supplies—Reimbursement. (1) The superintendent of public instruction shall furnish to the state board and to regional commit-tees the services of employed personnel and the materials and supplies necessary to enable them to perform the duties imposed upon them by this chapter and shall reimburse the members thereof for expenses necessarily incurred by them in the performance of their duties, such reimbursement for regional committee members to be in accordance with RCW 28A.315.155, and such reimbursement for state board members to be in accordance with RCW 28A.305.120.

(2) Costs that may be incurred by an educational service district in association with school district negotiations under RCW 28A.315.195 and supporting the regional committee under

RCW 28A.315.205 shall be reimbursed by the state from such funds as are appropriated for these purposes.

RCW 28A.315.095 Regional committees—Powers and duties. The powers and duties of each regional committee are to:

(1) Hear and approve or disapprove proposals for changes in the organization and extent of school districts in the educational service districts when a hearing on a proposal has been requested under RCW 28A.315.195;

(2) Act on notices and proposals from the educational service district under RCW 28A.315.225;

(3) Make an equitable adjustment of the property and other assets and of the liabilities, including bonded indebtedness and excess tax levies as otherwise authorized under this section, as to the old school districts and the new district or districts, if any, involved in or affected by a proposed change in the organization and extent of the school districts;

(4) Make an equitable adjustment of the bonded indebtedness outstanding against any of the old and new districts whenever in its judgment such adjustment is advisable, as to all of the school districts involved in or affected by any change heretofore or hereafter effected;

(5) Provide that territory transferred from a school district by a change in the organization and extent of school districts shall either remain subject to, or be relieved of, any one or more excess tax levies that are authorized for the school district under RCW 84.52.053

before the effective date of the transfer of territory from the school district;

(6) Provide that territory transferred to a school district by a change in the organization and extent of school districts shall either be made subject to, or be relieved of, any one or more excess tax levies that are authorized for the school district under RCW 84.52.053 before the effective date of the transfer of territory to the school district;

(7) Establish the date by which a committee-approved transfer of territory shall take effect;

(8) Hold and keep a record of a public hearing or public hearings (a) on every proposal for the formation of a new school district or for the transfer from one existing district to another of any territory in which children of school age reside or for annexation of territory when the conditions set forth in *RCW 28A.315.290 or 28A.315.320 prevail; and (b) on every proposal for adjustment of the assets and of the liabilities of school districts provided for in this chapter. Three members of the regional committee or two members of the committee and the educational service district superintendent may be designated by the committee to hold any public hearing that the committee is required to hold. The regional committee shall cause notice to be given, at least ten days prior to the date appointed for any such hearing, in one or more newspapers of general circulation within the geographical boundaries of the school districts affected by the proposed change or adjustment. In addition notice may be given by radio and television, or either thereof, when in the committee's judgment the public interest will be served thereby; and

(9) Prepare and submit to the superintendent of public instruction from time to time or, upon his or her request, reports and recommendations respecting the urgency of need for school plant facilities, the kind and extent of the facilities required, and the development of improved local school administrative units and attendance areas in the case of school districts that seek state assistance in providing school plant facilities.

RCW 28A.315.105 Regional committees—Created. There is hereby created in each educational service district a committee which shall be known as the regional committee on school district organization, which committee shall be composed of not less than seven nor more than nine registered voters of the educational service district, the number to correspond with the number of board member districts established for the governance of the educational service district in which the regional committee is located. One member of the regional committee shall be elected from the registered voters of each such educational service district board member district.

RCW 28A.315.115 Regional committees—Membership limitation. Persons possessing the status of any of the following positions shall not be eligible to be a member of a regional committee: The superintendent of public instruction, a member of the state board of education, an educational service district superintendent, a member of a board of directors of a school district, a member of an educational service district board, a member of a governing board of either a private school or a private school district which conducts any grades kindergarten through twelve, officers appointed by any such governing board, and employees of a school district, an educational

service district, the office of the superintendent of public instruction, a private school, or a private school district.

RCW 28A.315.125 Regional committees—Election of members-Qualifications. The members of each regional committee shall be elected in the following manner:

(1) On or before the 25th day of September, 1994, and not later than the 25th day of September of every subsequent even-numbered year, each superintendent of an educational service district shall call an election to be held in each educational service district within which resides a member of a regional committee whose term of office expires on the second Monday of January next following, and shall give written notice thereof to each member of the board of directors of each school district in the educational service district. Such notice shall include instructions, and the rules and regulations established by the state board of education for the conduct of the election. The state board of education is hereby empowered to adopt rules pursuant to chapter 34.05 RCW which establish standards and procedures which the state board deems necessary to conduct elections pursuant to this section; to conduct run-off elections in the event an election for a position is indecisive; and to decide run-off elections which result in tie votes, in a fair and orderly manner.

(2) Candidates for membership on a regional committee shall file a declaration of candidacy with the superintendent of the educational service district wherein they reside. Declarations of candidacy may be filed by person or by mail not earlier than the 1st day of October, and not later than the 15th day of October of each even-

numbered year. The superintendent may not accept any declaration of candidacy that is not on file in his or her office or not postmarked before the 16th day of October, or if not postmarked or the postmark is not legible, if received by mail after the 20th day of October of each even-numbered year.

(3) Each member of the regional committee shall be elected by a majority of the votes cast for all candidates for the position by the members of the boards of directors of school districts in the educational service district. All votes shall be cast by mail ballot addressed to the superintendent of the educational service district wherein the school director resides. No votes shall be accepted for counting if post-marked after the 16th day of November or if not postmarked or the postmark is not legible, if received by mail after the 21st day of November of each even-numbered year. An election board comprised of three persons appointed by the board of the educational service district shall count and tally the votes not later than the 25th day of November or the next business day if the 25th falls on a Saturday, Sunday, or legal holiday of each even-numbered year. Each vote cast by a school director shall be recorded as one vote. Within ten days following the count of votes, the educational service district superintendent shall certify to the superintendent of public instruction the name or names of the person(s) elected to be members of the regional committee.

(4) In the event of a change in the number of education-al service districts or in the number of educational service district board members pursuant to chapter 28A.310 RCW a new regional committee shall be elected for each affected educational service district at the next election conducted pursuant to this section. Those

persons who were serving on a regional committee within an educational service district affected by a change in the number of districts or board members shall continue to constitute the regional committee for the educational service district within which they are registered to vote until the majority of a new board has been elected and certified.

(5) No member of a regional committee shall continue to serve thereon if he or she ceases to be a registered voter of the educational service district board member district or if he or she is absent from three consecutive meetings of the committee without an excuse acceptable to the committee.

RCW 28A.315.135 Regional committees—Vacancies. In case of a vacancy from any cause on a regional committee, the remaining members of the commit-tee shall fill such vacancy by appointment pursuant to a majority vote of the remaining members: PROVIDED, That should there exist fewer members on a regional committee than constitutes a majority of the legally established commit-tee member positions, the educational service district board members of the district in which the committee is located, by the vote of a majority of the members in its legally established number of board member positions, shall appoint a sufficient number of committee members to constitute a legal majority on the committee. Appointees to fill vacancies shall meet the requirements provided by law for committee members and shall serve until the next regular election for members of regional committees at which time a successor shall be elected for the balance of the unexpired term.

Appendix HH

RCW 28A.315.145 Regional committees—Terms of members. The terms of members of the regional commit-tees shall be for four years and until their successors are certified as elected. For the 1994 election conducted pursuant to *RCW 28A.315.030 and the election of a new regional committee following a change in the number of educational service districts or board members, regional committee member positions one, three, five, seven, and nine shall be for a term of two years, positions two, four, six, and eight shall be for a term of four years.

RCW 28A.315.155 Regional committees—Members' expenses reimbursed. Members of each regional committee shall serve without compensation but shall be reimbursed for expenses necessarily incurred in the performance of their duties.

RCW 28A.315.165 Regional committees—Organization, meetings, quorum. Each regional committee shall organize by electing from its membership a chair and a vice chair. The educational service district superintendent shall be the secretary of the committee. Meetings of the committee shall be held upon call of the chair or of a majority of the members thereof. A majority of the commit-tee shall constitute a quorum.

RCW 28A.315.175 State board—Powers and duties. The powers and duties of the state board with respect to this chapter shall be:

(1) To aid regional committees in the performance of their duties by furnishing them with plans of procedure, standards, data, maps, forms, and other necessary materials and services essential to a study and

understanding of the problems of school district organization in their respective educational service districts.

(2) To hear appeals as provided in RCW 28A.315.205.

RCW 28A.315.185 Annual training. To the extent funds are appropriated, the superintendent of public instruction, in cooperation with the educational service districts and the Washington state school directors' association, shall conduct an annual training meeting for the regional commit-tees, state board members, educational service district superintendents, and local school district superintendents and boards of directors. Training may also be provided upon request.

RCW 28A.315.195 Transfer of territory by petition—Requirements—Rules—Costs. (1) A proposed change in school district organization by transfer of territory from one school district to another may be initiated by a petition in writing presented to the educational service district superintendent:

(a) Signed by at least fifty percent plus one of the registered voters residing in the territory proposed to be transferred; or

(b) Signed by a majority of the members of the board of directors of one of the districts affected by a proposed transfer of territory.

(2) The petition shall state the name and number of each district affected, describe the boundaries of the territory proposed to be transferred, and state the reasons

for desiring the change and the number of children of school age, if any, residing in the territory.

(3) The educational service district superintendent shall not complete any transfer of territory under this section that involves ten percent or more of the common school student population of the entire district from which the transfer is proposed, unless the educational service district superintendent has first called and held a special election of the voters of the entire school district from which the transfer of territory is proposed. The purpose of the election is to afford those voters an opportunity to approve or reject the proposed transfer. A simple majority shall determine approval or rejection.

(4) The state board may establish rules limiting the frequency of petitions that may be filed pertaining to territory included in whole or in part in a previous petition.

(5) Upon receipt of the petition, the educational service district superintendent shall notify in writing the affected districts that:

(a) Each school district board of directors, whether or not initiating a proposed transfer of territory, is required to enter into negotiations with the affected district or districts;

(b) In the case of a citizen-initiated petition, the affected districts must negotiate on the entire proposed transfer of territory;

(c) The districts have ninety calendar days in which to agree to the proposed transfer of territory;

(d) The districts may request and shall be granted by the educational service district superintendent one thirty-day extension to try to reach agreement; and

(e) Any district involved in the negotiations may at any time during the ninety-day period notify the educational service district superintendent in writing that agreement will not be possible.

(6) If the negotiating school boards cannot come to agreement about the proposed transfer of territory, the educational service district superintendent, if requested by the affected districts, shall appoint a mediator. The mediator has thirty days to work with the affected school districts to see if an agreement can be reached on the proposed transfer of territory.

(7) If the affected school districts cannot come to agreement about the proposed transfer of territory, and the districts do not request the services of a mediator or the mediator was unable to bring the districts to agreement, either district may file with the educational service district superintendent a written request for a hearing by the regional committee.

(8) If the affected school districts cannot come to agreement about the proposed transfer of territory initiated by citizen petition, and the districts do not request the services of a mediator or the mediator was unable to bring the districts to agreement, the district in which the citizens who filed the petition reside shall file with the educational service district superintendent a written request for a hearing by the regional committee, unless a majority of the citizen petitioners request otherwise.

(9) Upon receipt of a notice under subsection (7) or (8) of this section, the educational service district superintendent shall notify the chair of the regional committee in writing within ten days.

(10) Costs incurred by school districts under this section shall be reimbursed by the state from such funds as are appropriated for this purpose.

RCW 28A.315.205 Transfer of territory by petition—Regional committee responsibilities—Rules—Appeals. (1) The chair of the regional committee shall schedule a hearing on the proposed transfer of territory at a location in the educational service district within sixty calendar days of being notified under RCW 28A.315.195 (7) or (8).

(2) Within thirty calendar days of the hearing under subsection (1) of this section, or final hearing if more than one is held by the committee, the committee shall issue its written findings and decision to approve or disapprove the proposed transfer of territory. The educational service district superintendent shall transmit a copy of the committee's decision to the superintendents of the affected school districts within ten calendar days.

(3) In carrying out the purposes of RCW 28A.315.015 and in making decisions as authorized under RCW 28A.315.095(1), the regional committee shall base its judgment upon whether and to the extent the proposed change in school district organization complies with RCW 28A.315.015(2) and rules adopted by the state board under chapter 34.05 RCW.

(4) State board rules under subsection (3) of this section shall provide for giving consideration to all of the following:

(a) Student educational opportunities as measured by the percentage of students performing at each level of the state-wide mandated assessments and data regarding student attendance, graduation, and dropout rates;

(b) The safety and welfare of pupils. For the purposes of this subsection, "safety" means freedom or protection from danger, injury, or damage and "welfare" means a positive condition or influence regarding health, character, and well-being;

(c) The history and relationship of the property affected to the students and communities affected, including, for example, inclusion within a single school district, for school attendance and corresponding tax support purposes, of entire master planned communities that were or are to be developed pursuant to an integrated commercial and residential development plan with over one thousand dwelling units;

(d) Whether or not geographic accessibility warrants a favorable consideration of a recommended change in school district organization, including remoteness or isolation of places of residence and time required to travel to and from school; and

(e) All funding sources of the affected districts, equalization among school districts of the tax burden for general fund and capital purposes through a reduction in disparities in per pupil valuation when all funding sources

are considered, improvement in the economies in the administration and operation of schools, and the extent the proposed change would potentially reduce or increase the individual and aggregate transportation costs of the affected school districts.

(5)(a)(i) A petitioner or school district may appeal a decision by the regional committee to approve a change in school district organization to the state board based on the claim that the regional committee failed to follow the applicable statutory and regulatory procedures or acted in an arbitrary and capricious manner. Any such appeal shall be based on the record and the appeal must be filed within thirty days of the final decision of the regional committee.

(ii) If the state board finds that all applicable procedures were not followed or that the regional committee acted in an arbitrary and capricious manner, it shall refer the matter back to the regional committee with an explanation of the board's findings. The regional committee shall rehear the proposal.

(iii) If the state board finds that all applicable procedures were followed or that the regional committee did not act in an arbitrary and capricious manner, depending on the appeal, the educational service district shall be notified and directed to implement the changes.

(b) Any school district or citizen petitioner affected by a final decision of the regional committee may seek judicial review of the committee's decision in accordance with RCW 34.05.570.

Appendix HH

RCW 28A.315.215 Transfer of territory by agreement or order—Approval—Order. (1) Upon receipt by the educational service district superintendent of a written agreement by two or more school districts to the transfer of territory between the affected districts, the superintendent shall make an order establishing all approved changes involving the alteration of the boundaries of the affected districts. The order shall also establish all approved terms of the equitable adjustment of assets and liabilities involving the affected districts. The superintendent shall certify his or her action to each county auditor, each county treasurer, each county assessor, and the superintendents of all school districts affected by the action.

(2) Upon receipt by the educational service district superintendent of a written order by the regional committee approving the transfer of territory between two or more school districts, the superintendent shall make an order establishing all approved changes involving the alteration of the boundaries of the affected districts. The order may not be implemented before the period of appeal authorized under RCW 28A.315.205(5)(a)(i) has ended. The order shall also establish all approved terms of the equitable adjustment of assets and liabilities involving the affected districts. The superintendent shall certify his or her action to each county auditor, each county treasurer, each county assessor, and the superintendents of all school districts affected by the action.

RCW 28A.315.225 Dissolution and annexation of certain districts—Annexation of nondistrict property. In case any school district has an average enrollment of fewer than five kindergarten through eighth grade pupils during the preceding school year or has not

made a reasonable effort to maintain, during the preceding school year at least the minimum term of school required by law, the educational service district superintendent shall report that fact to the regional committee, which committee shall dissolve the school district and annex the territory thereof to some other district or districts. For the purposes of this section, in addition to any other finding, "reasonable effort" shall be deemed to mean the attempt to make up whatever days are short of the legal requirement by conducting of school classes on any days to include available holidays, though not to include Saturdays and Sundays, prior to June 15th of that year. School districts operating an extended school year program, most commonly implemented as a 45-15 plan, shall be deemed to be making a reasonable effort. In the event any school district has suffered any interruption in its normal school calendar due to a strike or other work stoppage or slowdown by any of its employees that district shall not be subject to this section. In case any territory is not a part of any school district, the educational service district superintendent shall present to the regional committee a proposal for the annexation of the territory to some contiguous district or districts.

RCW 28A.315.235 Consolidation—Petition. (1) A proposed change in school district organization by consolidation of territory from two or more school districts to form a new school district may be initiated by:

(a) A written petition presented to the educational service district superintendent signed by ten or more registered voters residing:

(i) In each whole district and in each part of a district proposed to be-included in any single new district; or

(ii) In the territory of a proposed new district that comprises a part of only one or more districts and approved by the boards of directors of the affected school districts;

(b) A written petition presented to the educational service district superintendent signed by ten percent or more of the registered voters residing in such affected areas or area without the approval of the boards of directors of the affected school districts.

(2) The petition shall state the name and number of each district involved in or affected by the proposal to form the new district and shall describe the boundaries of the pro-posed new district. No more than one petition for consolidation of the same two school districts or parts thereof shall be considered during a school fiscal year.

(3) The educational service district superintendent may not complete any consolidation of territory under this section unless he or she has first called and held a special election of the voters of the affected districts to afford those voters an opportunity to approve or reject the proposed consolidation. A simple majority shall determine approval or rejection.

(4) If a proposed change in school district organization by consolidation of territory has been approved under this section, the educational service district superintendent shall make- an order establishing all approved changes involving the alteration of the

boundaries of the affected districts. The order shall also establish all approved terms of the equitable adjustment of assets and liabilities involving the affected districts. The superintendent shall certify his or her action to each county auditor, each county treasurer, each county assessor, and the superintendents of all school districts affected by the action.

RCW 28A.315.245 Adjustment of assets and liabilities. In determining an equitable adjustment of assets and liabilities, the negotiating school districts and the regional committee shall consider the following factors:

(1) The number of school age children residing in each school district and in each part of a district involved or affected by the proposed change in school district organization;

(2) The assessed valuation of the property located in each school district and in each part of a district involved or affected by the proposed change in school district organization;

(3) The purpose for which the bonded indebtedness of any school district involved or affected by the proposed change in school district organization was incurred;

(4) The history and relationship of the property affected to the students and communities affected by the proposed change in school district organization;

(5) Additional burdens to the districts affected by the proposed change in school district organization as a result of the proposed organization;

(6) The value, location, and disposition of all improvements located in the school districts involved or affected by the proposed change in school district organization;

(7) The consideration of all other sources of funding; and

(8) Any other factors that in the judgment of the school districts or regional committee are important or essential to the making of an equitable adjustment of assets and liabilities.

RCW 28A.315.255 Adjustment of indebtedness. (1) The fact of the issuance of bonds by a school district, heretofore or hereafter, does not prevent changes in the organization and extent of school districts, regardless of whether or not such bonds or any part thereof are outstanding at the time of change.

(2) In case of any change:

(a) The bonded indebtedness outstanding against any school district involved in or affected by such change shall be adjusted equitably among the old school districts and the new district or districts, if any, involved or affected; and

(b) The property and other assets and the liabilities other than bonded indebtedness of any school district involved in or affected by any such change shall also be adjusted in the manner and to the effect provided

for in this section, except if all the territory of an old school district is included in a single new district or is annexed to a single existing district, in which event the title to the property and other assets and the liabilities other than bonded indebtedness of the old district vests in and becomes the assets and liabilities of the new district or of the existing district, as applicable.

RCW 28A.315.265 Adjustment of bonded indebtedness—Order-Special elections. If adjustments of bonded indebtedness are made between or among school districts in connection with the alteration of the boundaries of the school districts under this chapter, the order of the educational service district superintendent establishing the terms of adjustment of bonded indebtedness shall provide and specify:

(1) In every case where bonded indebtedness is transferred from one school district to another school district:

(a) That such bonded indebtedness is assumed by the school district to which it is transferred;

(b) That thereafter such bonded indebtedness shall be the obligation of the school district to which it is transferred;

(c) That, if the terms of adjustment so provide, any bonded indebtedness thereafter incurred by such transferee school district through the sale of bonds authorized before the date its boundaries were altered shall be the obligation of such school district including the territory added thereto; and

(d) That taxes shall be levied thereafter against the taxable property located within such school district as it is constituted after its boundaries were altered, the taxes to be levied at the times and in the amounts required to pay the principal of and the interest on the bonded indebtedness assumed or incurred, as the same become due and payable.

(2) In computing the debt limitation of any school district from which or to which bonded indebtedness has been transferred, the amount of transferred bonded indebtedness at any time outstanding:

(a) Shall be an offset against and deducted from the total bonded indebtedness, if any, of the school district from which the bonded indebtedness was transferred; and

(b) Shall be deemed to be bonded indebtedness solely of the transferee school district that assumed the indebtedness.

(3) In every case where adjustments of bonded indebtedness do not provide for transfer of bonded indebtedness from one school district to another school district:

(a) That the existing bonded indebtedness of each school district, the boundaries of which are altered and any bonded indebtedness incurred by each such school district thro[illegible]he sale of bonds authorized before the date its boundaries were altered is the obligation of the school district in its reduced or enlarged form, as the case may be; and

(b) That taxes shall be levied thereafter against the taxable property located within each such school district in its reduced or enlarged form, as the case may be, at the times and in the amounts required to pay the principal of and interest on such bonded indebtedness as the same become due and payable.

(4) If a change in school district organization approved by the regional committee concerns a proposal to form a new school district or a proposal for adjustment of bonded indebtedness involving an established school district and one or more former school districts now included therein pursuant to a vote of the people concerned, a special election of the voters residing within the territory of the proposed new district, or of the established district involved in a proposal for adjustment of bonded indebtedness as the case may be, shall be held for the purpose of affording those voters an opportunity to approve or reject such proposals as concern or affect them.

(5) In a case involving both the question of the formation of a new school district and the question of adjustment of bonded indebtedness, the questions may be submitted to the voters either in the form of a single proposition or as separate propositions, whichever seems expedient to the educational service district superintendent. When the regional committee has passed appropriate resolutions for the questions to be submitted and the educational service district superintendent has given notice thereof to the county auditor, the special election shall be called and conducted, and the returns canvassed as in regular school district elections.

RCW 28A.315.275 Notice of elections. Notice of special elections as provided for in RCW 28A.315.265

shall be given by the county auditor as provided in RCW 29.27.080. The notice of election shall state the purpose for which the election has been called and contain a description of the boundaries of the proposed new district and a statement of any terms of adjustment of bonded indebtedness on which to be voted.

RCW 28A.315.285 Special election—Determination—Order—Certification. (1) If a special election is held to vote on a proposal or alternate proposals to form a new school district, the votes cast by the registered voters in each component district shall be tabulated separately. Any such proposition shall be considered approved only if it receives a majority of the votes cast in each separate district voting thereon.

(2) If a special election is held to vote on a proposal for adjustment of bonded indebtedness, the entire vote cast by the registered voters of the proposed new district or of the established district as the case may be shall be tabulated. Any such proposition shall be considered approved if sixty percent or more of all votes cast thereon are in the affirmative.

(3) In the event of approval of a proposition or propositions voted on at a special election, the educational service district superintendent shall:

(a) Make an order establishing such new school district or such terms of adjustment of bonded indebtedness or both, as were approved by the registered voters and shall also order such other terms of adjustment, if there are any, of property and other assets and of liabilities other than bonded indebtedness as have been approved by the state council; and

(b) Certify his or her action to the county and school district officials specified in RCW 28A.315.215. The educational service district superintendent may designate, with the approval of the superintendent of public instruction, a name and number different from that of any component thereof, but must designate the new district by name and number different from any other district in existence in the county.

(4) The educational service district superintendent shall fix as the effective date of any order or orders he or she is required to make by this chapter, the date specified in the order of final approval of any change in the organization and extent of school districts or of any terms of adjustment of the assets and liabilities of school districts subject, for taxing purposes, to the redrawing of taxing district boundaries under RCW 84.09.030, by the regional committee.

(5) Upon receipt of certification under this section, the superintendent of each school district that is included in the new district shall deliver to the superintendent of the new school district those books, papers, documents, records, and other materials pertaining to the territory transferred.

RCW 28A.315.295 Rejection of proposal. If a proposal for the formation of a new school district and for adjustment of bonded indebtedness, or either, is rejected by the registered voters at a special election, the matter is terminated.

Appendix HH

RCW 28A.315.305 School district organizational changes—Corporate existence—Payment of bonded indebtedness—Levy authority. (1) Each school district involved in or affected by any change made in the organization and extent of school districts under this chapter retains its corporate existence insofar as is necessary for the purpose, until the bonded indebtedness outstanding against it on and after the effective date of the change has been paid in full. This section may not be construed to prevent, after the effective date of the change, such adjustments of bonded indebtedness as are provided for in this chapter.

(2) The county legislative authority shall provide, by appropriate levies on the taxable property of each school district, for the payment of the bonded indebtedness out-standing against it after any of the changes or adjustments under this chapter have been effected.

(3) In case any such changes or adjustments involve a joint school district, the tax levy for the payment of any bonded indebtedness outstanding against the joint district, after the changes or adjustments are effected, shall be made and the proceeds thereof shall be transmitted, credited, and paid out in conformity with the provisions of law applicable to the payment of the bonded indebtedness of joint school districts.

RCW 28A.315.315 Appeal. An appeal may be taken, as provided for in RCW 28A.645.010, to the superior court of the county in which a school district or any part thereof is situated on any question of adjustment of property and other assets and of liabilities provided for in this chapter. If the court finds the terms of the

adjustment in question not equitable, the court shall make an adjustment that is equitable.

RCW 28A.315.901 Part headings and captions not law—1999 c 315. Part headings and section captions used in this act are not any part of the law.